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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1988

FEBRUARY 21 THROUGH MARCH 29, 1989

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

FRANK D. WAGNER

REPORTER OF DECISIONS

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ERRATA

483 U. S. 3, line 15, add: "*Timothy J. Foley* was also on the brief for respondent."

484 U. S. XII, penultimate line: "Marshall" should be "Marshal".

484 U. S. 78, line 10: "ligitated" should be "litigated".

484 U. S. 79, note 1, line 9: "*[sic]*" should be added after "ligitation".

486 U. S. 698, line 13: "S. C." should be "D. S. C."

488 U. S. 423, line 20: "(1986)" should be "(1935)".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.

RETIRED

WARREN E. BURGER, CHIEF JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.

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*For order appointing Mrs. Dowling Librarian, effective January 15, 1989, see *post*, p. 1061.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 18, 1988, *viz.:*

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

February 18, 1988.

(For next previous allotment, and modifications, see 479 U. S., p. V, 483 U. S., pp. V, VI, and 484 U. S., pp. V, VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1988

TEXAS MONTHLY, INC. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF STATE OF TEXAS, ET AL.

APPEAL FROM THE COURT OF APPEALS OF TEXAS, THIRD DISTRICT

No. 87-1245. Argued November 1, 1988—Decided February 21, 1989

Between October 1984 and October 1987, a Texas statute exempted from sales and use taxes "[p]eriodicals . . . published or distributed by a religious faith . . . consist[ing] wholly of writings promulgating the teachings of the faith and books . . . consist[ing] wholly of writings sacred to a religious faith." In 1985, appellant, the publisher of a general interest magazine that was not entitled to the exemption, paid under protest sales taxes on the price of its qualifying subscription sales and sued to recover those payments in state court. Ruling that the exclusive exemption for religious periodicals promoted religion in violation of the Establishment Clause of the First Amendment, as made applicable to the States by the Fourteenth Amendment, and declaring itself "without power to rewrite the statute to make religious periodicals subject to tax," the court struck down the tax as applied to nonreligious periodicals and ordered the State to refund the tax paid by appellant, plus interest. The State Court of Appeals reversed, holding that the exemption satisfied the tripartite test of *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613, in that it (1) served the secular purpose of preserving separation between church and state; (2) did not have the primary effect of advancing or inhibiting religion; and (3) did not produce impermissible government entanglement with religion.

Held: The judgment is reversed, and the case is remanded.
731 S. W. 2d 160, reversed and remanded.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL and JUSTICE STEVENS, concluded:

1. Appellant has standing to challenge the exemption. The State's contention that appellant cannot show that it has suffered, or is threatened with, redressable injury is misguided, since it would effectively and impermissibly insulate an underinclusive statute from constitutional challenge. There is no merit to the State's argument that appellant could not obtain a tax refund if this Court were to declare the exemption invalid, since the proper course under state law would be to remove the exemption rather than to extend it to nonreligious periodicals or strike down the tax in its entirety. It is not for this Court to decide upon the correct response as a matter of state law to a finding of unconstitutionality. Moreover, the claim that appellant cannot qualify for injunctive relief because its subscription sales are no longer taxed under a 1987 amendment to the tax statute is irrelevant, since a live controversy persists over appellant's right to a refund, plus interest, and the State cannot strip appellant of standing by changing the law after taking its money. Pp. 7–8.

2. The exemption lacks sufficient breadth to pass scrutiny under the Establishment Clause. The fact that a subsidy incidentally benefits religious groups does not deprive it of the secular purpose and effect mandated by the Clause, so long as it is conferred on a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end. However, when, as here, government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause of the First Amendment and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, it cannot be viewed as anything but impermissible state sponsorship of religion, particularly where the subsidy is targeted at writings that *promulgate* the teachings of religious faiths. Because it confines itself exclusively to such religious publications, the Texas exemption lacks a secular objective that would justify its preference along with similar benefits for nonreligious publications or groups. Nevertheless, Texas is free to widen the exemption, so long as the class of exempt organizations is sufficiently expansive to be consonant with some legitimate secular purpose. Pp. 8–17.

3. Neither the Free Exercise Clause nor the Establishment Clause prevents Texas from withdrawing its current exemption for religious publications if it chooses not to expand it to promote some legitimate secular aim. Pp. 17–25.

1 Syllabus

(a) The State cannot claim persuasively that its exemption is compelled by the Free Exercise Clause in even a single instance, let alone in every case, since it has adduced no evidence that the payment of a sales tax by subscribers to religious periodicals or purchasers of religious books would offend their religious beliefs or inhibit religious activity. Moreover, even if members of some religious group succeeded in demonstrating that payment of a sales tax—or, less plausibly, of a sales tax which applied to printed matter—would violate their religious tenets, it is by no means obvious that the State would be required by the Clause to make individualized exceptions for them, since a limitation on religious liberty may be justified by showing that it is essential to accomplish an overriding governmental interest. There has been no suggestion that members of any major religious denomination—the principal beneficiaries of the exemption—could demonstrate an infringement of their free exercise rights sufficiently serious to overcome the State's countervailing interest in collecting its sales tax. Pp. 17–20.

(b) The Establishment Clause does not mandate the exemption, since, by requiring that public officials determine whether some message or activity is consistent with "the teachings of the faith," the exemption appears, on its face, to produce greater state entanglement with religion than would the denial of an exemption. Although compliance with government regulations by religious organizations and the monitoring of that compliance by government agencies would itself enmesh the operation of church and state to some degree, such compliance would generally not impede the evangelical activities of religious groups. Moreover, the routine and factual inquiries commonly associated with the enforcement of tax laws bear no resemblance to the kind of government surveillance this Court has previously held to pose an intolerable risk of entanglement. Pp. 20–21.

(c) *Murdock* v. *Pennsylvania*, 319 U. S. 105, and *Follett* v. *McCormick*, 321 U. S. 573, do not bar Texas' imposing a general sales tax on religious publications. To the extent that *Murdock* and *Follett* held that a flat license or occupation tax designed for commercial salesmen cannot constitutionally be imposed on religious missionaries whose principal work is preaching and who only occasionally sell religious tracts for small sums, where that activity is deemed central to the particular faith and where the tax burden is far from negligible, those decisions are plainly consistent with the present decision. Texas' sales tax is neither an occupation tax levied on missionaries nor a flat tax that restrains in advance the free exercise of religion; poses little danger of stamping out missionary work involving the sale of religious publications because it is equal to a small fraction of the value of each sale and is payable by the buyer; and can hardly be viewed as a covert attempt to curtail religious activity in

view of its generality. However, to the extent that unnecessarily broad language in *Murdock* and *Follett* might be read to suggest that the sale of religious or other publications may never be taxed, those dicta must be rejected. This Court's subsequent decisions make clear that even if the denial of tax benefits will inevitably have a substantial impact on religious groups, the refusal to grant such benefits does not offend the Free Exercise Clause when it does not prevent those groups from observing their religious tenets. In the common circumstances exemplified by this case, taxes or regulations would not subject religious organizations to undue burdens, and the government has a far weightier interest in their uniform application. Pp. 21–25.

JUSTICE WHITE concluded that *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, is directly applicable here and is the proper basis for reversing the judgment below, since the Texas law at issue violates the Press Clause of the First Amendment by taxing appellant while exempting other publishers solely on the basis of the religious content of their publications. Pp. 25–26.

JUSTICE BLACKMUN, joined by JUSTICE O'CONNOR, concluded that the extent to which the Free Exercise Clause requires a tax exemption for the sale of religious literature by a religious organization need not be decided here, since the case should be resolved on the narrow ground that an exemption such as the one at issue that is *limited to* religious organizations' sales of their religious literature violates the Establishment Clause. Regardless of whether *Follett* v. *McCormick*, 321 U. S. 573, and *Murdock* v. *Pennsylvania*, 319 U. S. 105, prohibit taxing the sale of religious literature, the Texas statute engages in a preferential support for the communication of religious messages that offends the most basic understanding of what the Establishment Clause is all about. Pp. 28–29.

BRENNAN, J., announced the judgment of the Court and delivered an opinion, in which MARSHALL and STEVENS, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 25. BLACKMUN, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 26. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined, *post*, p. 29.

Roger James George, Jr., argued the cause for appellant. With him on the briefs were *John M. Harmon* and *Pamela Stanton Baron*.

Harriet D. Burke, Assistant Attorney General of Texas, argued the cause for appellees. With her on the brief were

Jim Mattox, Attorney General, *Mary F. Keller*, First Assistant Attorney General, and *Lou McCreary*, Executive Assistant Attorney General.*

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion, in which JUSTICE MARSHALL and JUSTICE STEVENS join.

Texas exempts from its sales tax "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." Tex. Tax Code Ann. § 151.312 (1982). The question presented is whether this exemption violates the Establishment Clause or the Free Press Clause of the First Amendment when the State denies a like exemption for other publications. We hold that, when confined exclusively to publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment Clause; accordingly, we need not reach the question whether it contravenes the Free Press Clause as well.

I

Prior to October 2, 1984, Texas exempted from its sales and use tax magazine subscriptions running half a year or longer and entered as second class mail. Tex. Tax Code Ann. § 151.320 (1982). This exemption was repealed as of October 2, 1984, before being reinstated effective October 1, 1987. Tex. Tax Code Ann. § 151.320 (Supp. 1988–1989). Throughout this 3-year period, Texas continued to exempt from its sales and use tax periodicals published or distributed by a religious faith consisting entirely of writings promulgating the teaching of the faith, along with books consisting

*Briefs of *amici curiae* urging reversal were filed for the American Booksellers Association, Inc., by *Maxwell J. Lillienstein;* for the American Civil Liberties Union et al. by *James C. Harrington, Steven R. Shapiro,* and *John A. Powell;* and for the Magazine Publishers of America, Inc., by *Eli D. Minton* and *James R. Cregan.*

solely of writings sacred to a religious faith. Tex. Tax Code Ann. § 151.312 (1982).

Appellant Texas Monthly, Inc., publishes a general interest magazine of the same name. Appellant is not a religious faith, and its magazine does not contain only articles promulgating the teaching of a religious faith. Thus, it was required during this 3-year period to collect and remit to the State the applicable sales tax on the price of qualifying subscription sales. Tex. Tax Code Ann. §§ 151.051, 151.052, 151.401 (1982 and Supp. 1988–1989). In 1985, appellant paid sales taxes of $149,107.74 under protest and sued to recover those payments in state court.

The District Court of Travis County, Texas, ruled that an exclusive exemption for religious periodicals had "no basis . . . other than the promotion of religion itself, a prohibited reason" under the Establishment Clause. App. to Juris. Statement 47. The court also found the exemption unconstitutional because it discriminated on the basis of the content of publications, presumably in violation of the Free Press Clause. *Id.*, at 42. Declaring itself "without power to rewrite the statute to make religious periodicals subject to tax," *id.*, at 47, the court struck down the tax as applied to nonreligious periodicals and ordered the State to refund the amount of tax Texas Monthly had paid, plus interest. *Id.*, at 43.

The Court of Appeals, Third Supreme Judicial District of Texas, reversed by a 2-to-1 vote. 731 S. W. 2d 160 (1987). Applying the tripartite test enunciated in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971), the court held, first, that the exemption served the secular purpose of preserving separation between church and state. Second, the court asserted that the exemption did not have the primary effect of advancing or inhibiting religion, because "the effect of religious tax exemptions such as § 151.312 is to permit religious organizations to be independent of government support or sanction." 731 S. W. 2d, at 163. The court considered it irrele-

vant that the exemption did not extend to other nonprofit or secular publications, because "the *neutrality* toward religion effected by the grant of an exemption for religious periodicals" remained unaffected by the provision or denial of a similar exemption for nonreligious publications. *Id.*, at 164. Finally, the court concluded that the exemption did not produce impermissible government entanglement with religion. Rather than scrutinize each publication for which a publisher sought an exemption for conformity with the statute's terms, the court found, the Comptroller's Office merely required that a group applying for an exemption demonstrate that it was a religious organization. Once a satisfactory showing had been made, the Comptroller's Office did not later reassess the group's status as a religious organization. It further allowed the group to determine, without review by the State, which of its publications promulgated the teaching of its faith. Because the exemption was administered to minimize state entanglement with religion, the court thought it consistent with *Lemon*'s third prong.

In addition, the court rejected Texas Monthly's claim that the exemption violated the Free Press Clause because it discriminated among publications on the basis of their content. The court read our decision in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221 (1987), to preclude only those taxes that are imposed solely on the press or targeted at a small group within the press. Because Texas' exemption encompassed only a minority of publications, leaving the bulk of subscription sales subject to tax, the court reasoned that it escaped the strictures of the Free Press Clause as we had interpreted it.

We noted probable jurisdiction, 485 U. S. 958 (1988), and now reverse.

II

As a preliminary matter, Texas argues that appellant lacks standing to challenge the constitutionality of the exemption. It claims that if this Court were to declare the exemption

invalid, the proper course under state law would be to remove the exemption for religious publications, rather than extend it to nonreligious periodicals or strike down the sales and use tax in its entirety. If Texas is right, appellant cannot obtain a refund of the tax it paid under protest. Nor can it qualify for injunctive relief, because its subscription sales are no longer taxed. Hence, Texas contends, appellant cannot show that it has suffered or is threatened with redressable injury, which this Court declared to be a prerequisite for standing in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 472 (1982).

The State's contention is misguided. In *Arkansas Writers' Project*, *supra*, at 227, we rejected a similar argument, "for it would effectively insulate underinclusive statutes from constitutional challenge, a proposition we soundly rejected in *Orr* v. *Orr*, 440 U. S. 268, 272 (1979)." It is not for us to decide whether the correct response as a matter of state law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether. Nor does it make any difference—contrary to the State's suggestion—that Texas Monthly seeks only a refund and not prospective relief, as did the appellant in *Arkansas Writers' Project*. A live controversy persists over Texas Monthly's right to recover the $149,107.74 it paid, plus interest. Texas cannot strip appellant of standing by changing the law after taking its money.

III

In proscribing all laws "respecting an establishment of religion," the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally. It is part of our settled jurisprudence that "the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such, or

to favor the adherents of any sect or religious organization." *Gillette* v. *United States*, 401 U. S. 437, 450 (1971). See, *e. g.*, *School Dist. of Grand Rapids* v. *Ball*, 473 U. S. 373, 381 (1985); *Wallace* v. *Jaffree*, 472 U. S. 38, 52–53, and n. 37 (1985); *Welsh* v. *United States*, 398 U. S. 333, 356–357 (1970) (Harlan, J., concurring in result); *Epperson* v. *Arkansas*, 393 U. S. 97, 103–104 (1968); *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 216–217 (1963); *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961); *Everson* v. *Board of Education of Ewing*, 330 U. S. 1, 15–16 (1947). The core notion animating the requirement that a statute possess "a secular legislative purpose" and that "its principal or primary effect . . . be one that neither advances nor inhibits religion," *Lemon* v. *Kurtzman*, 403 U. S., at 612, is not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.[1]

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[1] JUSTICE O'CONNOR's concurrence in *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), properly emphasized this point:

"[T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' [*Lynch* v. *Donnelly*, 465 U. S. 668, 688 (1984) (O'CONNOR, J., concurring).] Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." *Id.*, at 69.

See also *Lynch* v. *Donnelly*, 465 U. S. 668, 701 (1984) (BRENNAN, J., dissenting) (the Establishment Clause was designed to prevent "religious chauvinism" that tells "minority religious groups, as well as . . . those who

It does not follow, of course, that government policies with secular objectives may not incidentally benefit religion. The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur. See *Mueller* v. *Allen*, 463 U. S. 388, 393 (1983). Nor have we required that legislative categories make no explicit reference to religion. See *Wallace* v. *Jaffree*, *supra*, at 70 (O'CONNOR, J., concurring in judgment) ("The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy"); *Lynch* v. *Donnelly*, 465 U. S. 668, 715 (1984) (BRENNAN, J., dissenting). Government need not resign itself to ineffectual diffidence because of exaggerated fears of contagion of or by religion, so long as neither intrudes unduly into the affairs of the other.

Thus, in *Widmar* v. *Vincent*, 454 U. S. 263 (1981), we held that a state university that makes its facilities available to registered student groups may not deny equal access to a registered student group desiring to use those facilities for religious worship or discussion. Although religious groups benefit from access to university facilities, a state university may not discriminate against them based on the content of their speech, and the university need not ban all student group meetings on campus in order to avoid providing any assistance to religion. Similarly, in *Mueller* v. *Allen*, *supra*, we upheld a state income tax deduction for the cost of tuition, transportation, and nonreligious textbooks paid by a taxpayer for the benefit of a dependent. To be sure, the deduction aided parochial schools and parents whose children attended them, as well as nonsectarian private schools and their pupils' parents. We did not conclude, however, that

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may reject all religion, . . . that their views are not similarly worthy of public recognition nor entitled to public support").

this subsidy deprived the law of an overriding secular purpose or effect. And in the case most nearly on point, *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664 (1970), we sustained a property tax exemption that applied to religious properties no less than to real estate owned by a wide array of nonprofit organizations, despite the sizable tax savings it accorded religious groups.

In all of these cases, however, we emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect. See, *e. g.*, *School Dist. of Grand Rapids* v. *Ball*, *supra* (invalidating state-funded educational programs in private schools, where 40 of the 41 beneficiaries were religious schools); *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703 (1985) (finding violative of the Establishment Clause a statute providing Sabbath observers with an unconditional right not to work on their chosen Sabbath).

In *Widmar* v. *Vincent*, we noted that an open forum in a public university would not betray state approval of religion so long as the forum was available "to a broad class of nonreligious as well as religious speakers." 454 U. S., at 274. "The provision of benefits to so broad a spectrum of groups," we said, "is an important index of secular effect." *Ibid.* We concluded that the primary effect of an open forum would not be to advance religion, "[a]t least in the absence of empirical evidence that religious groups will dominate" it. *Id.*, at 275. Likewise, in *Mueller* v. *Allen*, we deemed it "particularly significant," 463 U. S., at 396, that "the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools." *Id.*, at 397.

Finally, we emphasized in *Walz* that in granting a property tax deduction, the State "has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." 397 U. S., at 673. The breadth of New York's property tax exemption was essential to our holding that it was "not aimed at establishing, sponsoring, or supporting religion," *id.*, at 674, but rather possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity and encouraging private groups to undertake projects that advanced the community's well-being and that would otherwise have to be funded by tax revenues or left undone.[2] Moreover, "[t]he scheme [was]

[2] Although we found it "unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others," *Walz* v. *Tax Comm'n*, 397 U. S., at 674, we in no way intimated that the exemption would have been valid had it applied *only* to the property of religious groups or had it lacked a permissible secular objective. Rather, we concluded that the State might reasonably have determined that religious groups generally contribute to the cultural and moral improvement of the community, perform useful social services, and enhance a desirable pluralism of viewpoint and enterprise, just as do the host of other nonprofit organizations that qualified for the exemption. It is because the set of organizations defined by these secular objectives was so large that we saw no need to inquire into the secular benefits provided by religious groups that sought to avail themselves of the exemption. In addition, we noted that inquiry into the particular contributions of each religious group "would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." *Ibid.* We therefore upheld the State's classification of religious organizations among the socially beneficial associations whose activities it desired to foster. Had the State defined the class of subsidized activities more narrowly—to encompass only "charitable" works, for example—more searching scrutiny would have been necessary, notwithstanding the greater intermingling of government and religion that

not designed to inject any religious activity into a nonreligious context, as was the case with school prayers. No particular activity of a religious organization—for example, the propagation of its beliefs—[was] specially promoted by the exemptions." *Id.*, at 689 (BRENNAN, J., concurring). As Justice Harlan observed:

> "To the extent that religious institutions sponsor the secular activities that this legislation is designed to promote, it is consistent with neutrality to grant them an exemption just as other organizations devoting resources to these projects receive exemptions. . . . As long as the breadth of exemption includes groups that pursue cultural, moral, or spiritual improvement in multifarious secular ways, including, I would suppose, groups whose avowed tenets may be antitheological, atheistic, or agnostic, I can see no lack of neutrality in extending the benefit of the exemption to organized religious groups."[3] *Id.*, at 697 (separate opinion) (footnote omitted).

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would likely result. Cf. *id.*, at 697, n. 1 (opinion of Harlan, J.); *Bob Jones University* v. *United States*, 461 U. S. 574, 591–592, and n. 18 (1983).

[3] The dissent's accusation that we have distorted or misdescribed the Court's holding in *Walz*, *post*, at 33–38, is simply mistaken. The Court expressly stated in *Walz* that the legislative purpose of New York's property tax exemption was *not* to accommodate religion. Rather, "New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement,' should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes." 397 U. S., at 672. Churches, we found, were reasonably classified among a diverse array of nonprofit groups that promoted this end. But it was only because churches, along with numerous other groups, produced these public benefits that we approved their exemption from property tax. The Court said quite plainly: "The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest. Qualification for tax exemption is not perpetual or immutable; some tax-exempt groups lose that status when their activities

Texas' sales tax exemption for periodicals published or distributed by a religious faith and consisting wholly of writings promulgating the teaching of the faith lacks sufficient breadth to pass scrutiny under the Establishment Clause. Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become "indirect and vicarious 'donors.'" *Bob Jones University* v. *United States*, 461 U. S. 574, 591 (1983). See also *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 544 (1983). Insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end,[4] the fact that religious groups

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take them outside the classification and new entities can come into being and qualify for exemption." *Id.*, at 673. Although the concurring opinions in *Walz* amplified this point, the opinion for the Court relied on it as well in determining that the tax exemption possessed a valid secular purpose.

Nor is our reading of *Walz* by any means novel. Indeed, it has been the Court's accepted understanding of the holding in *Walz* for almost 20 years. In *Gillette* v. *United States*, 401 U. S. 437, 454 (1971), we said: "'Neutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties, *Walz* v. *Tax Comm'n*, 397 U. S., at 669, so long as an exemption is tailored broadly enough that it reflects valid secular purposes." We read *Walz* to stand for the same proposition in *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U. S. 756, 793–794 (1973). "Without intimating whether this factor alone might have controlling significance in another context in some future case," we noted that the breadth of an exemption for religious groups is unquestionably an "important factor" in assessing its constitutionality. *Id.*, at 794. Our opinion today builds on established precedents; it does not repudiate them.

[4] The fact that Texas grants other sales tax exemptions (*e. g.*, for sales of food, agricultural items, and property used in the manufacture of articles for ultimate sale) for *different* purposes does not rescue the exemption for religious periodicals from invalidation. What is crucial is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for nonreligious groups. There is no evidence in the record, and Texas does not argue in its brief to this Court, that the exemption for religious periodicals was grounded in some secular legislative policy that motivated similar tax breaks for nonreligious activi-

benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause. However, when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, see *infra*, at 17–20, it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 348 (1987) (O'CONNOR, J., concurring in judgment). This is particularly true where, as here, the subsidy is targeted at writings that *promulgate* the teachings of religious faiths.[5] It is difficult to view Texas' narrow exemption as anything but state sponsorship of religious belief, regardless of whether one adopts the perspective of beneficiaries or of uncompensated contributors.

How expansive the class of exempt organizations or activities must be to withstand constitutional assault depends upon the State's secular aim in granting a tax exemption. If the State chose to subsidize, by means of a tax exemption, all groups that contributed to the community's cultural, intellectual, and moral betterment, then the exemption for religious publications could be retained, provided that the exemption swept as widely as the property tax exemption we upheld in

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ties. It certainly appears that the exemption was intended to benefit religion alone.

[5] Not only did the property tax exemption sustained in *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664 (1970), extend to a large number of nonreligious organizations that ostensibly served an expressly articulated secular objective that religious groups could reasonably be thought to advance as well; it also failed to single out religious proselytizing as an activity deserving of public assistance.

Walz.[6] By contrast, if Texas sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life, then a tax exemption would have to be available to an extended range of associations whose publications were substantially devoted to such matters; the exemption could not be reserved for publications dealing solely with religious issues, let alone restricted to publications advocating rather than criticizing religious belief or activity, without signaling an endorsement of religion that is offensive to the principles informing the Establishment Clause. See *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S., at 711 (O'CONNOR, J., concurring) (because the statute bestows an advantage on Sabbath observers "without according similar accommodation to ethical and religious beliefs and practices of other private employees," "[t]he message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it"; the statute therefore "has the effect of advancing religion, and cannot withstand Establishment Clause scrutiny"); *Welsh* v. *United States*, 398 U. S., at 356–361 (Harlan, J., concurring in result) (conscientious objector status cannot be limited to those whose opposition to war has religious roots, but must extend to those whose convictions have purely moral or philosophical sources).

It is not our responsibility to specify which permissible secular objectives, if any, the State should pursue to justify a tax exemption for religious periodicals. That charge rests with the Texas Legislature. Our task, and that of the Texas courts, is rather to ensure that any scheme of exemptions

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[6] Texas' sales and use tax provides a model of such an exemption when it frees, *inter alia*, organizations "created for religious, educational, or charitable purposes" from the payment of sales and use tax on items they purchase, rent, or consume. Tex. Tax Code Ann. § 151.310(a)(1) (1982). In view of this provision, the special exemption for publications carrying religious messages suggests even more strongly the State's sponsorship of religion.

adopted by the legislature does not have the purpose or effect of sponsoring certain religious tenets or religious belief in general. As Justice Harlan remarked: "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Walz*, 397 U. S., at 696 (separate opinion). Because Texas' sales tax exemption for periodicals promulgating the teaching of any religious sect lacks a secular objective that would justify this preference along with similar benefits for nonreligious publications or groups, and because it effectively endorses religious belief, the exemption manifestly fails this test.[7]

IV

A

In defense of its sales tax exemption for religious publications, Texas claims that it has a compelling interest in avoiding violations of the Free Exercise and Establishment Clauses, and that the exemption serves that end. Without such an exemption, Texas contends, its sales tax might trammel free exercise rights, as did the flat license tax this Court struck down as applied to proselytizing by Jehovah's Witnesses in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). In addition, Texas argues that an exemption for religious publications neither advances nor inhibits religion, as required by the Establishment Clause, and that its elimination would entangle church and state to a greater degree than the exemption itself.

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[7] In light of this holding, we need not address Texas Monthly's contention that the sales tax exemption also violates the Free Press Clause as we interpreted it in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221 (1987).

We reject both parts of this argument. Although Texas may widen its exemption consonant with some legitimate secular purpose, nothing in our decisions under the Free Exercise Clause prevents the State from eliminating altogether its exemption for religious publications. "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290, 303 (1985) (citations omitted). In this case, the State has adduced no evidence that the payment of a sales tax by subscribers to religious periodicals or purchasers of religious books would offend their religious beliefs or inhibit religious activity. The State therefore cannot claim persuasively that its tax exemption is compelled by the Free Exercise Clause in even a single instance, let alone in every case. No concrete need to accommodate religious activity has been shown.[8]

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[8] Contrary to the dissent's claims, *post*, at 29–30, 38, 42, we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause. Our decisions in *Zorach* v. *Clauson*, 343 U. S. 306 (1952), and *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987), offer two examples. Similarly, if the Air Force provided a sufficiently broad exemption from its dress requirements for servicemen whose religious faiths commanded them to wear certain headgear or other attire, see *Goldman* v. *Weinberger*, 475 U. S. 503 (1986), that exemption presumably would not be invalid under the Establishment Clause even though this Court has not found it to be required by the Free Exercise Clause.

All of these cases, however, involve legislative exemptions that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs, or that were designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause. New York City's decision to release students from public schools so that

Moreover, even if members of some religious group succeeded in demonstrating that payment of a sales tax—or, less plausibly, of a sales tax when applied to printed matter—would violate their religious tenets, it is by no means obvious that the State would be required by the Free Exercise Clause to make individualized exceptions for them. In *United States* v. *Lee*, 455 U. S. 252 (1982), we ruled unanimously that the Federal Government need not exempt an Amish employer from the payment of Social Security taxes, notwithstanding our recognition that compliance would offend his religious beliefs. We noted that "[n]ot all burdens on religion are unconstitutional," *id.*, at 257, and held that "[t]he state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." *Id.*, at 257–258. Although the balancing test we set forth in *Lee* must be performed on a case-by-case basis, a State's interest in the uniform collection of a

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they might obtain religious instruction elsewhere, which we upheld in *Zorach*, was found not to coerce students who wished to remain behind to alter their religious beliefs, nor did it impose monetary costs on their parents or other taxpayers who opposed, or were indifferent to, the religious instruction given to students who were released. The hypothetical Air Force uniform exemption also would not place a monetary burden on those required to conform to the dress code or subject them to any appreciable privation. And the application of Title VII's exemption for religious organizations that we approved in *Corporation of Presiding Bishop*, though it had some adverse effect on those holding or seeking employment with those organizations (if not on taxpayers generally), prevented potentially serious encroachments on protected religious freedoms.

Texas' tax exemption, by contrast, does not remove a demonstrated and possibly grave imposition on religious activity sheltered by the Free Exercise Clause. Moreover, it burdens nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications. The fact that such exemptions are of long standing cannot shield them from the strictures of the Establishment Clause. As we said in *Walz* v. *Tax Comm'n*, 397 U. S., at 678, "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."

sales tax appears comparable to the Federal Government's interest in the uniform collection of Social Security taxes, and mandatory exemptions under the Free Exercise Clause are arguably as difficult to prove. No one has suggested that members of any of the major religious denominations in the United States—the principal beneficiaries of Texas' tax exemption—could demonstrate an infringement of their free exercise rights sufficiently serious to overcome the State's countervailing interest in collecting its sales tax.

B

Texas' further claim that the Establishment Clause mandates, or at least favors, its sales tax exemption for religious periodicals is equally unconvincing. Not only does the exemption seem a blatant endorsement of religion, but it appears, on its face, to produce greater state entanglement with religion than the denial of an exemption. As JUSTICE STEVENS has noted: "[There exists an] overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude." *Id.*, at 263, n. 2 (concurring in judgment). See *Bob Jones University* v. *United States*, 461 U. S., at 604, n. 30. The prospect of inconsistent treatment and government embroilment in controversies over religious doctrine seems especially baleful where, as in the case of Texas' sales tax exemption, a statute requires that public officials determine whether some message or activity is consistent with "the teaching of the faith." See, *e. g.*, *Jones* v. *Wolf*, 443 U. S. 595 (1979); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U. S. 696 (1976); *Presbyterian Church in U. S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440 (1969).[9]

[9] At trial, Texas' Supervisor for Sales Tax Policy testified that the Comptroller's Office did not in fact heed the statutory command to grant

While Texas is correct in pointing out that compliance with government regulations by religious organizations and the monitoring of their compliance by government agencies would itself enmesh the operations of church and state to some degree, we have found that such compliance would generally not impede the evangelical activities of religious groups and that the "routine and factual inquiries" commonly associated with the enforcement of tax laws "bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion." *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S., at 305.

On the record before us, neither the Free Exercise Clause nor the Establishment Clause prevents Texas from withdrawing its current exemption for religious publications if it chooses not to expand it to promote some legitimate secular aim.

C

Our conclusion today is admittedly in tension with some unnecessarily sweeping statements in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), and *Follett* v. *McCormick*, 321 U. S. 573 (1944). To the extent that language in those opinions is inconsistent with our decision here, based on the evolution in our thinking about the Religion Clauses over the last 45 years, we disavow it.

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exemptions only for publications that promulgated the teaching of a particular faith; instead, the Office allowed religious publishers or distributors to determine whether their publications qualified for the exemption. App. 60–61. Although this approach undoubtedly reduced the degree of state entanglement in religious affairs from that which would have resulted from strict application of the statute, we cannot attach great significance to current administrative practice. That practice has not been embodied in the regulation corresponding to the statutory exemption, which repeats almost verbatim the words of the statute. 34 Tex. Admin. Code § 3.299(d) (1986). It is, moreover, at odds with the plain statutory language. It would appear open to future administrators to subject the content of religious publications to more exacting scrutiny.

In *Murdock*, the Court ruled that a city could not impose a flat license tax payable by "all persons canvassing for or soliciting . . . orders for goods, paintings, pictures, wares, or merchandise of any kind" on Jehovah's Witnesses who "went about from door to door . . . distributing literature and soliciting people to 'purchase' certain religious books and pamphlets." 319 U. S., at 106. In *Follett*, the Court ruled similarly that a Jehovah's Witness who "went from house to house distributing certain books" was exempt under the Free Exercise Clause from payment of a flat business and occupation tax on booksellers. 321 U. S., at 574. In both cases, the majority stated that the "sale" of religious pamphlets by itinerant evangelists was a form of *preaching*, *Murdock*, *supra*, at 109; *Follett*, *supra*, at 577, and that imposing a license or occupation tax on such a preacher was tantamount to exacting "a tax from him for the privilege of delivering a sermon." *Murdock*, 319 U. S., at 112. The Court acknowledged that imposing an income or property tax on preachers would not be unconstitutional. *Ibid.* It emphasized, however, that a flat license or occupation tax poses a greater threat to the free exercise of religion than do those other taxes, because it is "levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment" and thus "restrains in advance those constitutional liberties . . . and inevitably tends to suppress their exercise." *Id.*, at 114. See *Follett*, *supra*, at 575.

If one accepts the majority's characterization of the critical issues in *Murdock* and *Follett*, those decisions are easily compatible with our holding here. In striking down application of the town ordinance to Jehovah's Witnesses in *Follett*—an ordinance the Court found to be "in all material respects the same," 321 U. S., at 574, as the one whose application it restricted in *Murdock*—the Court declared that only a single "narrow" question was presented: "It is whether a flat license tax as applied to one who earns his livelihood as an evangelist or preacher in his home town is constitutional." 321 U. S.,

at 576. Regarding *Follett* in this light, we must agree that "we have quite a different case from that of a merchant who sells books at a stand or on the road." *Ibid.* There is no doubt that the First Amendment prevents both the States and the Federal Government from imposing a special occupation tax exclusively on those who devote their days to spreading religious messages. Moreover, it is questionable whether, consistent with the Free Exercise Clause, government may exact a facially neutral license fee designed for commercial salesmen from religious missionaries whose principal work is preaching and who only occasionally sell religious tracts for small sums, so long as "the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors." *Murdock*, *supra*, at 116. In such a case, equal treatment of commercial and religious solicitation might result in an unconstitutional imposition on religious activity warranting judicial relief, particularly where that activity is deemed central to a given faith, as the Court found this form of proselytizing to be in *Murdock* and *Follett*, and where the tax burden is far from negligible.[10]

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[10] In *Murdock* v. *Pennsylvania*, 319 U. S., at 109, n. 7, the Court noted that Seventh-day Adventist missionaries, who sold religious literature while proselytizing door to door in a manner akin to Jehovah's Witnesses, earned on average only $65 per month in 1941, half of which they were permitted to keep in order to pay their traveling and living expenses. The license fee whose application was challenged in *Murdock* amounted to $1.50 for one day, $7 for one week, $12 for two weeks, and $20 for three weeks. *Id.*, at 106. If towns were permitted to levy such fees from itinerant preachers whose average earnings totaled only $32.50 per month before income taxes because their sales of religious literature were merely incidental to their primary evangelical mission, then they could easily throttle such missionary work. A Seventh-day Adventist who spent each day in a different town would have to pay $45 in fees over the course of a 30-day month; if his income were only $32.50, he could not even afford the necessary licenses, let alone support himself once he had met his legal obligations.

Insofar as the Court's holdings in *Murdock* and *Follett* are limited to these points, they are plainly consistent with our decision today. The sales tax that Texas imposes is not an occupation tax levied on religious missionaries. Nor is it a flat tax that "restrains in advance," 319 U. S., at 114, the free exercise of religion. On the contrary, because the tax is equal to a small fraction of the value of each sale and payable by the buyer, it poses little danger of stamping out missionary work involving the sale of religious publications, and in view of its generality it can hardly be viewed as a covert attempt to curtail religious activity. We therefore see no inconsistency between our former decisions and our present holding.

To the extent that our opinions in *Murdock* and *Follett* might be read, however, to suggest that the States and the Federal Government may never tax the sale of religious or other publications, we reject those dicta.[11] Our intervening decisions make clear that even if the denial of tax benefits "will inevitably have a substantial impact" on religious groups, the refusal to grant such benefits does not offend the Free Exercise Clause when it does not prevent those groups "from observing their religious tenets." *Bob Jones Univer-*

[11] For example, in *Murdock*, *supra*, at 111, the Court wrote: "The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. . . . Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." In our view, this passage suggests nothing more than that commercial speech is on a different footing for constitutional purposes than other types of speech. Reading it to bar all taxes that might impede the dissemination of printed messages other than commercial advertisements would go well beyond the language of the passage and be difficult to reconcile with the Court's approval of income and property taxes levied on preachers (and presumably political pamphleteers or literary authors). 319 U. S., at 112. In any event, we reject this broad reading, whether or not the Court intended the passage to bear that meaning.

sity v. *United States*, 461 U. S., at 603–604. In *Murdock* and *Follett*, the application of a flat license or occupation tax to Jehovah's Witnesses arguably did prevent adherents of that sect from acting in accordance with some of their central religious beliefs, in the absence of any overriding government interest in denying them an exemption.[12] In the much more common circumstances exemplified by this case, however, taxes or regulations would not subject religious organizations to undue burdens and the government's interest in their uniform application is far weightier. Hence, there is no bar to Texas' imposing a general sales tax on religious publications.

V

We conclude that Texas' sales tax exemption for religious publications violates the First Amendment, as made applicable to the States by the Fourteenth Amendment. Accordingly, the judgment of the Texas Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE WHITE, concurring in the judgment.

The Texas law at issue here discriminates on the basis of the content of publications: it provides that "[p]eriodicals . . . that consist wholly of writings promulgating the teaching of (a religious faith) . . . are exempted" from the burdens of the sales tax law. Tex. Tax Code Ann. § 151.312 (1982). Thus,

[12] Thus, the Court noted in *Murdock*, *supra*, at 109, that the proselytizing done by Jehovah's Witnesses "is as evangelical as the revival meeting" and "occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." The Court further emphasized that the dissemination of their views in this manner was not adventitious to Jehovah's Witnesses' primary beliefs, but rather was regarded by them as a duty imposed on them by God. 319 U. S., at 108. For its part, the city defended its tax as a legitimate levy on *commercial* activity, *id.*, at 110, and apparently never contended that exceptions for religious evangelists would cause administrative difficulties or produce excessive state entanglement with religion.

the content of a publication determines whether its publisher is exempt or nonexempt. Appellant is subject to the tax, but other publications are not because of the message they carry. This is plainly forbidden by the Press Clause of the First Amendment. *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221 (1987), our most recent decision to this effect, is directly applicable here, and is the proper basis for reversing the judgment below.

JUSTICE BLACKMUN, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

The Texas statute at issue touches upon values that underlie three different Clauses of the First Amendment: the Free Exercise Clause, the Establishment Clause, and the Press Clause. As indicated by the number of opinions issued in this case today, harmonizing these several values is not an easy task.

The Free Exercise Clause value suggests that a State may not impose a tax on spreading the gospel. See *Follett* v. *McCormick*, 321 U. S. 573 (1944), and *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). The Establishment Clause value suggests that a State may not give a tax break to those who spread the gospel that it does not also give to others who actively might advocate disbelief in religion. See *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961); *Everson* v. *Board of Education of Ewing*, 330 U. S. 1, 15–16 (1947). The Press Clause value suggests that a State may not tax the sale of some publications, but not others, based on their content, absent a compelling reason for doing so. See *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 231 (1987).

It perhaps is fairly easy to reconcile the Free Exercise and Press Clause values. If the Free Exercise Clause suggests that a State may not tax the sale of religious literature by a religious organization, this fact alone would give a State a compelling reason to exclude this category of sales from an otherwise general sales tax. In this respect, I agree gener-

ally with what JUSTICE SCALIA says in Part II of his dissenting opinion.

I find it more difficult to reconcile in this case the Free Exercise and Establishment Clause values. The Free Exercise Clause suggests that a special exemption for religious books is required. The Establishment Clause suggests that a special exemption for religious books is forbidden. This tension between mandated and prohibited religious exemptions is well recognized. See, *e. g.*, *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664, 668–669 (1970). Of course, identifying the problem does not resolve it.

JUSTICE BRENNAN's opinion, in its Part IV, would resolve the tension between the Free Exercise and Establishment Clause values simply by subordinating the Free Exercise value, even, it seems to me, at the expense of longstanding precedents. See *ante*, at 21–25 (repudiating *Follett* and *Murdock* to the extent inconsistent with the newfound proposition that a State generally may tax the sale of a Bible by a church). JUSTICE SCALIA's opinion, conversely, would subordinate the Establishment Clause value. This position, it seems to me, runs afoul of the previously settled notion that government may not favor religious belief over disbelief. See, *e. g.*, *Wallace* v. *Jaffree*, 472 U. S. 38, 53 (1985); *Welsh* v. *United States*, 398 U. S. 333, 356 (1970) (Harlan, J., concurring in result); *Epperson* v. *Arkansas*, 393 U. S. 97, 103–104 (1968); *Abington School District* v. *Schempp*, 374 U. S. 203, 218, 220 (1963); *Torcaso* v. *Watkins*, 367 U. S., at 495.

Perhaps it is a vain desire, but I would like to decide the present case without necessarily sacrificing either the Free Exercise Clause value or the Establishment Clause value. It is possible for a State to write a tax-exemption statute consistent with both values: for example, a state statute might exempt the sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being

and nonbeing, right and wrong. Such a statute, moreover, should survive Press Clause scrutiny because its exemption would be narrowly tailored to meet the compelling interests that underlie both the Free Exercise and Establishment Clauses.

To recognize this possible reconciliation of the competing First Amendment considerations is one thing; to impose it upon a State as its only legislative choice is something else. JUSTICE SCALIA rightly points out, *post*, at 42, that the Free Exercise and Establishment Clauses often appear like Scylla and Charybdis, leaving a State little room to maneuver between them. The Press Clause adds yet a third hazard to a State's safe passage through the legislative waters concerning the taxation of books and journals. We in the Judiciary must be wary of interpreting these three constitutional Clauses in a manner that negates the legislative role altogether.

I believe we can avoid most of these difficulties with a narrow resolution of the case before us. We need not decide today the extent to which the Free Exercise Clause requires a tax exemption for the sale of religious literature by a religious organization; in other words, defining the ultimate scope of *Follett* and *Murdock* may be left for another day. We need decide here only whether a tax exemption *limited to* the sale of religious literature by religious organizations violates the Establishment Clause. I conclude that it does.

In this case, by confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages. Although some forms of accommodating religion are constitutionally permissible, see *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987), this one surely is not. A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable. See *Wallace*

v. *Jaffree*, 472 U. S., at 69–70 (O'CONNOR, J., concurring in judgment); *Epperson* v. *Arkansas*, 393 U. S., at 103–104. Accordingly, whether or not *Follett* and *Murdock* prohibit taxing the sale of religious literature, the Establishment Clause prohibits a tax exemption limited to the sale of religious literature. Cf. *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703 (1985) (the Establishment Clause prohibits a statute that grants employees an unqualified right not to work on their Sabbath), and *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 145–146, and n. 11 (1987) (consistent with *Caldor*, the Free Exercise Clause prohibits denying unemployment compensation to employees who refuse to work on their Sabbath).

At oral argument, appellees suggested that the statute at issue here exempted from taxation the sale of atheistic literature distributed by an atheistic organization. Tr. of Oral Arg. 33. If true, this statute might survive Establishment Clause scrutiny, as well as Free Exercise and Press Clause scrutiny. But, as appellees were quick to concede at argument, the record contains nothing to support this facially implausible interpretation of the statute. *Ibid.* Thus, constrained to construe this Texas statute as exempting religious literature alone, I concur in the holding that it contravenes the Establishment Clause, and in remanding the case for further proceedings not inconsistent with this holding.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

As a judicial demolition project, today's decision is impressive. The machinery employed by the opinions of JUSTICE BRENNAN and JUSTICE BLACKMUN is no more substantial than the antinomy that accommodation of religion may be required but not permitted, and the bold but unsupportable assertion (given such realities as the text of the Declaration of Independence, the national Thanksgiving Day proclaimed by every President since Lincoln, the inscriptions on our coins, the words of our Pledge of Allegiance, the invocation with

which sessions of our Court are opened and, come to think of it, the discriminatory protection of freedom of religion in the Constitution) that government may not "convey a message of endorsement of religion." With this frail equipment, the Court topples an exemption for religious publications of a sort that expressly appears in the laws of at least 15 of the 45 States that have sales and use taxes[1]—States from Maine to Texas, from Idaho to New Jersey.[2] In practice, a similar

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[1] Only Alaska, Delaware, Montana, New Hampshire, and Oregon do not have state sales taxes.

[2] See Ala. Code § 40–23–62(20) (Supp. 1988) (exempting from use tax "religious magazines and publications"); Fla. Stat. § 212.06(9) (Supp. 1988) (exempting from sales and use tax "the sale or distribution of religious publications, bibles, hymn books, prayer books," and other religious material); Ga. Code Ann. § 48–8–3(15)(A) (Supp. 1988) (exempting from sales tax religious newspapers owned and operated by religious institutions); § 48–8–3(16) (exempting from sales tax sales of "Holy Bibles, testaments and similar books commonly recognized as being Holy Scripture"); Idaho Code § 63–3622I (Supp. 1988) (exempting from sales and use tax the sale of "religious literature, pamphlets, periodicals, tracts, and books" if published and sold by "a bona fide church or religious denomination"); Me. Rev. Stat. Ann., Tit. 36, § 1760(13) (1978) (exempting from sales tax "[s]ales of the Bible and also other books and literature . . . used in and by established churches for religion and prayer"); Md. Ann. Code, Art. 81, § 326(u) (1980) (exempting from sales tax all sales by "bona fide church or religious organization"); Mass. Gen. Laws § 64H:6(m) (1986) (exempting from sales tax "books used for religious worship"); N. J. Stat. Ann. § 54:32B–8.25 (West 1986) (exempting from sales tax "receipts from sales of the Bible or similar sacred scripture"); N. C. Gen. Stat. § 105–164.13(14) (1985) (exempting from sales tax "Holy Bibles"); N. D. Cent. Code § 57–39.2–04(25) (1983) (exempting from sales tax "Bibles, hymnals, textbooks, and prayerbooks" sold to religious organizations); Pa. Stat. Ann., Tit. 72, § 7204(28) (Purdon Supp. 1988–1989) (exempting from sales tax "the sale at retail or use of religious publications . . . and Bibles"); R. I. Gen. Laws § 44–18–30(HH) (Supp. 1987) (exempting from sales tax "any canonized scriptures of any tax-exempt non-profit religious organizations including but not limited to the old testament and new testament versions"); S. C. Code § 12–35–550(7) (Supp. 1988) (exempting from sales and use tax sales "of . . . religious publications, including the Holy Bible"); Tenn. Code Ann. § 67–6–323 (1983) (exempting from sales and use tax sales of "religious publications to

exemption may well exist in even more States than that, since until today our case law has suggested that it is not only permissible but perhaps required. See *Follett* v. *McCormick*, 321 U. S. 573 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943). I expect, for example, that even in States without express exemptions many churches, and many tax assessors, have thought sales taxes inapplicable to the religious literature typically offered for sale in church foyers.

When one expands the inquiry to sales taxes on items other than publications and to other types of taxes such as property, income, amusement, and motor vehicle taxes—all of which are likewise affected by today's holding—the Court's accomplishment is even more impressive. At least 45 States provide exemptions for religious groups without analogous exemptions for other types of nonprofit institutions.[3] For

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or by churches"); Tex. Tax Code Ann. § 151.312 (1982) (exempting from sales tax religious periodicals and sacred books).

[3] See, in addition to n. 2, *supra*, Ala. Code § 40–9–1(6) (Supp. 1988) (exempting from property tax "libraries of ministers of the gospel" and "all religious books kept for sale by ministers of the gospel and colporteurs"); Alaska Stat. Ann. § 29.45.030(b)(1) (1986) (exempting from property tax residence of "bishop, pastor, priest, rabbi, [or] minister"); Ariz. Rev. Stat. Ann. § 42–1310.14(A) (Supp. 1988–1989) (exempting from transaction privilege tax "projects of bona fide religious . . . institutions"); Ark. Code Ann. § 26–52–401 (Supp. 1987) (extending property tax exemption for religious and charitable institutions to religious recreational centers, day-care centers, and parsonages); Cal. Rev. & Tax. Code Ann. § 6363.5 (West 1987) (exempting from sales tax meals and food products furnished by or served by any religious institution); Colo. Rev. Stat. § 39–3–102 (1982) (establishing special property tax exemption for first $16,000 in valuation of each parsonage); Conn. Gen. Stat. § 12–81(12) (1983) (exempting from personal property tax personal property of "a Connecticut religious organization" used for "religious or charitable purposes"); § 12–81(15) (exempting from property tax homes of clergymen owned by religious organizations); D. C. Code § 47–1002(15) (1987) (exempting from property tax pastoral residences); § 47–1002(16) (exempting from property tax bishops' residences); Ga. Code Ann. § 48–5–41(a)(3) (Supp. 1988) (exempting from property tax residences for pastors owned by religious organizations); Haw. Rev. Stat. § 244D–4(b)(4) (Supp. 1987) (exempting from liquor tax spirits sold or

over half a century the federal Internal Revenue Code has allowed "minister[s] of the gospel" (a term interpreted broadly enough to include cantors and rabbis) to exclude from gross

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used for "sacramental purposes"); Haw. Rev. Stat. § 246–32(b)(3) (1985) (exempting from property tax parsonages); Idaho Code § 63–3622J (Supp. 1988) (exempting from sales tax sales of meals by churches); Ill. Rev. Stat., ch. 120, ¶ 500.2 (1987) (exempting from property tax parsonages and bishops' residences); Ind. Code § 6–1.1–10–36.3 (1988) (exempting from property tax parsonages); Kan. Stat. Ann. § 79–3602(j) (1984) (exempting from sales tax sale by religious organization "of tangible personal property acquired for . . . resale"); Ky. Const. § 170 (exempting from property tax parsonages); La. Rev. Stat. Ann. § 47:47 (West 1970) (excluding from state income tax rental income of parsonage of "minister of the gospel"); Md. Ann. Code, Art. 81, § 326(c)(i) (1980) (exempting from sales tax sales of food by religious organizations); Mass. Gen. Laws § 59:5, Eleventh (1986) (exempting from local property tax parsonages and official residences of other religious officials); Mich. Comp. Laws § 205.54a(b)(ii) (Supp. 1988–1989) (exempting from sales tax sales of vehicles "used primarily for the transportation of persons for religious purposes"); Mich. Comp. Laws § 211.7s (1986) (exempting from property tax parsonages); Miss. Code Ann. § 27–11–43(b) (Supp. 1988) (exempting from amusement tax programs "composed entirely of gospel singing and not generally mixed with hillbilly or popular singing"); § 27–33–19(d) (exempting from property tax homes of "minister[s] of the gospel"); Mo. Rev. Stat. § 144.450(5) (1986) (exempting from use tax motor vehicles "owned and used by religious organizations" to transfer students to religious schools); Mont. Code Ann. § 15–6–201(b) (1987) (exempting from property tax "residences of the clergy"); Neb. Rev. Stat. § 77–2702(6)(d) (Supp. 1987) (exempting from sales tax occasional sales "by an organization created exclusively for religious purposes"); § 77–2704(1)(g)(ii) (exempting from sales tax meals served by church at church function); Nev. Rev. Stat. § 361.125(1) (1986) (exempting from property tax parsonages); N. H. Rev. Stat. Ann. § 72:23 (III) (1970) (exempting from property tax "church parsonages"); N. H. Rev. Stat. Ann. § 72:23(VI) (Supp. 1988) (exempting religious organizations from reporting requirements for other nonprofit institutions); N. J. Stat. Ann. § 54:4–3.35 (West 1986) (exempting from property tax residences of "district supervisors of religious organizations"); N. M. Stat. Ann. § 7–9–41 (1988) (exempting from receipts tax "receipts of a minister of a religious organization . . . from religious services"); N. Y. Real Prop. Tax Law § 436 (McKinney 1984) (exempting from property tax property held in trust by clergymen); § 462 (exempting from property tax residences of "of-

income the rental value of their parsonages. 26 U. S. C. § 107; see also § 213(b)(11) of the Revenue Act of 1921, ch. 136, 42 Stat. 239. In short, religious tax exemptions of the type the Court invalidates today permeate the state and federal codes, and have done so for many years.

I dissent because I find no basis in the text of the Constitution, the decisions of this Court, or the traditions of our people for disapproving this longstanding and widespread practice.

I

The opinions of JUSTICE BRENNAN and JUSTICE BLACKMUN proceed as though this were a matter of first impression. It is not. Nineteen years ago, in *Walz* v. *Tax Comm'n of New York City*, 397 U. S. 664 (1970), we considered and rejected an Establishment Clause challenge that was in all relevant respects identical. Since today's opinions barely acknowledge the Court's decision in that case (as opposed to the separate concurrences of Justices BRENNAN and Harlan), it requires some discussion here. *Walz* involved

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ficiating clergymen"); N. D. Cent. Code § 57–02–08(7) (Supp. 1987) (exempting from property tax dwellings of bishops, priests, rectors, or ministers); Okla. Stat., Tit. 68, § 1356(F) (Supp. 1989) (exempting from sales tax sales of meals made "to or by churches"); R. I. Gen. Laws § 44–3–3 (Supp. 1987) (exempting from property tax residences of clergymen); S. D. Codified Laws § 35–5–6(2) (Supp. 1988) (exempting from beverage tax sacramental wine); Tex. Tax Code Ann. §§ 11.20(a)(3) and (4) (Supp. 1988–1989) (exempting from property tax dwellings of religious clergy); Vt. Stat. Ann., Tit. 32, § 3802(4) (1981) (exempting from property tax parsonages for ministers); Va. Code § 58.1–3617 (Supp. 1988) (exempting from property tax vehicles "owned by churches and used for church purposes"); § 58.1–608(38) (exempting from sales tax "property . . . purchased by churches" for use in religious services by a congregation); Wash. Rev. Code § 66.20.020(3) (1987) (exempting from licensing requirements "wine [used] for sacramental purposes"); Wash. Rev. Code § 84.36.020 (1987) (exempting from property tax parsonages); W. Va. Code § 11–3–9 (1987) (exempting from property tax parsonages); Wis. Stat. § 70.11(4) (1985–1986) (exempting from property tax "housing for pastors"); Wyo. Stat. § 39–1–201 (a)(vii) (Supp. 1988) (exempting from property tax "church parsonages").

New York City's grant of tax exemptions, pursuant to a state statute and a provision of the State Constitution, to "religious organizations for religious properties used solely for religious worship." *Id.*, at 666–667, and n. 1. In upholding the exemption, we conducted an analysis that contains the substance of the three-pronged "test" adopted the following Term in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). First, we concluded that "[t]he legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion." 397 U. S., at 672. We reached that conclusion because past cases and the historical record established that property tax exemption "constitutes a reasonable and balanced attempt to guard against" the "latent dangers" of government hostility to religion. *Id.*, at 673. We drew a distinction between an unlawful intent to favor religion and a lawful intent to "'accommodat[e] the public service to [the people's] spiritual needs,'" *id.*, at 672 (quoting *Zorach* v. *Clauson*, 343 U. S. 306, 314 (1952)), and found only the latter to be involved in "sparing the exercise of religion from the burden of property taxation levied on private profit institutions," 397 U. S., at 673.

We further concluded that the exemption did not have the primary effect of sponsoring religious activity. We noted that, although tax exemptions may have the same economic effect as state subsidies, for Establishment Clause purposes such "indirect economic benefit" is significantly different.

> "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. . . . There is no genuine nexus between tax exemption and establishment of religion." *Id.*, at 675.

JUSTICE BRENNAN also recognized this distinction in his concurring opinion:

> "Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer." *Id.*, at 690 (footnote omitted).

See also *id.*, at 691 ("Tax exemptions . . . constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy").

Third, we held that the New York exemption did not produce unacceptable government entanglement with religion. In fact, quite to the contrary. Since the exemptions avoided the "tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes," *id.*, at 674, we found that their elimination would increase government's involvement with religious institutions, *id.*, at 674–676. See also *id.*, at 691 (BRENNAN, J., concurring) ("[I]t cannot realistically be said that termination of religious tax exemptions would quantitatively lessen the extent of state involvement with religion").

We recognized in *Walz* that the exemption of religion from various taxes had existed without challenge in the law of all 50 States and the National Government before, during, and after the framing of the First Amendment's Religion Clauses, and had achieved "undeviating acceptance" throughout the 200-year history of our Nation. "Few concepts," we said, "are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference." *Id.*, at 676–677. See also *id.*, at 681 (BRENNAN, J., concurring) (noting the "the undeviating ac-

ceptance given religious tax exemptions from our earliest days as a Nation").

It should be apparent from this discussion that *Walz*, which we have reaffirmed on numerous occasions in the last two decades, *e. g.*, *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327 (1987), is utterly dispositive of the Establishment Clause claim before us here. The Court invalidates § 151.312 of the Texas Tax Code only by distorting the holding of that case and radically altering the well-settled Establishment Clause jurisprudence which that case represents.

JUSTICE BRENNAN explains away *Walz* by asserting that "[t]he breadth of New York's property tax exemption was essential to our holding that it was 'not aimed at establishing, sponsoring, or supporting religion.'" *Ante*, at 12 (quoting *Walz*, 397 U. S., at 674). This is not a plausible reading of the opinion. At the outset of its discussion concerning the permissibility of the legislative purpose, the *Walz* Court did discuss the fact that the New York tax exemption applied not just to religions but to certain other "nonprofit" groups, including "hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." *Id.*, at 673. The finding of valid legislative purpose was not rested upon that, however, but upon the more direct proposition that "exemption constitutes a reasonable and balanced attempt to guard against" the "latent dangers" of governmental hostility towards religion "inherent in the imposition of property taxes." *Ibid.* The venerable federal legislation that the Court cited to support its holding was not legislation that exempted religion along with other things, but legislation that exempted *religion alone*. See, *e. g.*, ch. 17, 6 Stat. 116 (1813) (remitting duties paid on the importation of plates for printing Bibles); ch. 91, 6 Stat. 346 (1826) (remitting duties paid on the importation of church vestments, furniture, and paintings); ch. 259, 6 Stat. 600 (1834) (remitting duties paid on the importation of church bells). Moreover, if the Court had in-

tended to rely upon a "breadth of coverage" rationale, it would have had to identify some characteristic that rationally placed religion within the same policy category as the other institutions. JUSTICE BRENNAN's concurring opinion in *Walz* conducted such an analysis, finding the New York exemption permissible only because religions, like the other types of nonprofit organizations exempted, "contribute to the well-being of the community in a variety of nonreligious ways," 397 U. S., at 687, and (incomprehensibly) because they "uniquely contribute to the pluralism of American society by their religious activities," *id.*, at 689. (I say incomprehensibly because to favor religion for its "unique contribution" is to favor religion as religion.) Justice Harlan's opinion conducted a similar analysis, finding that the New York statute "defined a class of nontaxable entities whose common denominator is their nonprofit pursuit of activities devoted to cultural and moral improvement and the doing of 'good works' by performing certain social services in the community that might otherwise have to be assumed by government." *Id.*, at 696. The Court's opinion in *Walz*, however, not only failed to conduct such an analysis, but—seemingly in reply to the concurrences—*explicitly and categorically disavowed reliance upon it*, concluding its discussion of legislative purpose with a paragraph that begins as follows: "We find it unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others," *id.*, at 674. This should be compared with today's rewriting of *Walz:* "[W]e concluded that the State might reasonably have determined that religious groups generally contribute to the cultural and moral improvement of the community, perform useful social services, and enhance a desirable pluralism of viewpoint and enterprise, just as do the host of other nonprofit organizations that qualified for the exemption." *Ante*, at 12, n. 2. This is a marvellously accurate description of what Justices BRENNAN and Harlan believed, and what the Court specifically re-

jected. The Court did not approve an exemption for charities that happened to benefit religion; it approved an exemption for religion *as* an exemption for religion.

Today's opinions go beyond misdescribing *Walz*, however. In repudiating what *Walz* in fact approved, they achieve a revolution in our Establishment Clause jurisprudence, effectively overruling other cases that were based, as *Walz* was, on the "accommodation of religion" rationale. According to JUSTICE BRENNAN's opinion, no law is constitutional whose "benefits [are] confined to religious organizations," *ante*, at 11—except, of course, those laws that are unconstitutional *unless* they contain benefits confined to religious organizations, see *ante*, at 17–18. See also JUSTICE BLACKMUN's opinion, *ante*, at 28. Our jurisprudence affords no support for this unlikely proposition. *Walz* is just one of a long line of cases in which we have recognized that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 144–145 (1987); see McConnell, Accommodation of Religion, 1985 S. Ct. Rev. 1, 3. In such cases as *Sherbert* v. *Verner*, 374 U. S. 398 (1963), *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972), *Thomas* v. *Review Bd. of Ind. Employment Security Div.*, 450 U. S. 707 (1981), and *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, *supra*, we held that the Free Exercise Clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws. We have often made clear, however, that "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U. S., at 673. See also *Hobbie*, *supra*, at 144–145, and n. 10; *Gillette* v. *United States*, 401 U. S. 437, 453 (1971); *Braunfeld* v. *Brown*, 366 U. S. 599, 605–608 (1961) (plurality opinion); *Wallace* v. *Jaffree*, 472 U. S. 38, 82 (1985) (O'CONNOR, J., concurring).

We applied the accommodation principle, to permit special treatment of religion that was not required by the Free Exercise Clause, in *Zorach* v. *Clauson*, 343 U. S. 306 (1952), where we found no constitutional objection to a New York City program permitting public school children to absent themselves one hour a week for "religious observance and education outside the school grounds," *id.*, at 308, n. 1. We applied the same principle only two Terms ago in *Corporation of Presiding Bishop*, where, citing *Zorach* and *Walz*, we upheld a section of the Civil Rights Act of 1964 exempting religious groups (and only religious groups) from Title VII's antidiscrimination provisions. We found that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." 483 U. S., at 335. We specifically rejected the District Court's conclusion identical to that which a majority of the Court endorses today: that invalidity followed from the fact that the exemption "singles out religious entities for a benefit, rather than benefiting a broad grouping of which religious organizations are only a part." *Id.*, at 333. We stated that the Court "has never indicated that statutes that give special consideration to religious groups are *per se* invalid." *Id.*, at 338. As discussed earlier, it was this same principle of permissible accommodation that we applied in *Walz*.

The novelty of today's holding is obscured by JUSTICE BRENNAN's citation and description of many cases in which "breadth of coverage" *was* relevant to the First Amendment determination. See *ante*, at 10–11. Breadth of coverage is essential to constitutionality whenever a law's benefiting of religious activity is sought to be defended not specifically (or not exclusively) as an intentional and reasonable accommodation of religion, but as merely the incidental consequence of seeking to benefit *all* activity that achieves a particular secular goal. But that is a different rationale—more commonly invoked than accommodation of religion but, as our cases

show, not preclusive of it. Where accommodation of religion is the justification, by definition religion is being singled out. The same confusion of rationales explains the facility with which JUSTICE BRENNAN's opinion can portray the present statute as violating the first prong of the *Lemon* test, which is usually described as requiring a "secular legislative purpose." *Lemon*, 403 U. S., at 612. That is an entirely accurate description of the governing rule when, as in *Lemon* and most other cases, government aid to religious institutions is sought to be justified on the ground that it is not religion *per se* that is the object of assistance, but rather the secular functions that the religious institutions, along with other institutions, provide. But as I noted earlier, the substance of the *Lemon* test (purpose, effect, entanglement) was first roughly set forth in *Walz*—and in *that* context, the "accommodation of religion" context, the purpose was said to be valid so long as it was "neither the advancement nor the inhibition of religion; . . . neither sponsorship nor hostility." 397 U. S., at 672. Of course rather than reformulating the *Lemon* test in "accommodation" cases (the text of *Lemon* is not, after all, a statutory enactment), one might instead simply describe the protection of free exercise concerns, and the maintenance of the necessary neutrality, as "secular purpose and effect," since they are a purpose and effect approved, and indeed to some degree mandated, by the Constitution. However the reconciliation with the *Lemon* terminology is achieved, our cases make plain that it is permissible for a State to act with the purpose and effect of "limiting governmental interference with the exercise of religion." *Corporation of Presiding Bishop*, 483 U. S., at 339.

It is not always easy to determine when accommodation slides over into promotion, and neutrality into favoritism, but the withholding of a tax upon the dissemination of religious materials is not even a close case. The subjects of the exemption before us consist exclusively of "writings promulgating the teaching of the faith" and "writings sacred to a reli-

gious faith." If there is any close question, it is not whether the exemption is permitted, but whether it is constitutionally compelled in order to avoid "interference with the dissemination of religious ideas." *Gillette*, 401 U. S., at 462. In *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), we held that it was unconstitutional to apply a municipal license tax on door-to-door solicitation to sellers of religious books and pamphlets. One Term later, in *Follett* v. *McCormick*, 321 U. S. 573 (1944), we held that it was unconstitutional to apply to such persons a municipal license tax on "[a]gents selling books." Those cases are not as readily distinguishable as JUSTICE BRENNAN suggests. I doubt whether it would have made any difference (as he contends) if the municipalities had attempted to achieve the same result of burdening the religious activity through a sales tax rather than a license tax; surely such a distinction trivializes the holdings. And the other basis of distinction he proposes—that the persons taxed in those cases were "religious missionaries whose principal work is preaching"—is simply not available with respect to the first part of the statute at issue here (which happens to be the portion upon which petitioner placed its exclusive reliance). Unlike the Texas exemption for sacred books, which, on its face at least, applies to all sales, the exemption for periodicals applies to material that not only "consist[s] wholly of writings promulgating the teaching of [a religious] faith," but also is "published or distributed by [that] faith." Surely this is material distributed by missionaries. Unless, again, one wishes to trivialize the earlier cases, whether they are full-time or part-time missionaries can hardly make a difference, nor can the fact that they conduct their proselytizing through the mail or from a church or store instead of door-to-door.

I am willing to acknowledge, however, that *Murdock* and *Follett* are narrowly distinguishable. But what follows from that is not the facile conclusion that therefore the State has no "compelling interest in avoiding violations of the Free Ex-

ercise and Establishment Clauses," *ante*, at 17, and thus the exemption is invalid. This analysis is yet another expression of JUSTICE BRENNAN's repudiation of the accommodation principle—which, as described earlier, consists of recognition that "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U. S., at 673. By saying that what is not required cannot be allowed, JUSTICE BRENNAN would completely block off the already narrow "channel between the Scylla [of what the Free Exercise Clause demands] and the Charybdis [of what the Establishment Clause forbids] through which any state or federal action must pass in order to survive constitutional scrutiny." *Thomas*, 450 U. S., at 721 (REHNQUIST, J., dissenting). The proper lesson to be drawn from the narrow distinguishing of *Murdock* and *Follett* is quite different: If the exemption comes so close to being a constitutionally required accommodation, there is no doubt that it is at least a permissible one.

Although JUSTICE BRENNAN's opinion places almost its entire reliance upon the "purpose" prong of *Lemon*, it alludes briefly to the second prong as well, finding that § 151.312 has the impermissible "effect of sponsoring certain religious tenets or religious belief in general," *ante*, at 17. Once again, *Walz* stands in stark opposition to this assertion, but it may be useful to explain why. Quite obviously, a sales tax exemption aids religion, since it makes it less costly for religions to disseminate their beliefs. Cf. *Murdock*, *supra*, at 112–113. But that has never been enough to strike down an enactment under the Establishment Clause. "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." *Corporation of Presiding Bishop*, *supra*, at 337 (emphasis in original). The Court has consistently rejected "the argument that any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause. *Muel-*

ler v. *Allen*, 463 U. S. 388, 393 (1983) (quoting *Hunt* v. *McNair*, 413 U. S. 734, 742 (1973)). To be sure, we have set our face against the subsidizing of religion—and in other contexts we have suggested that tax exemptions and subsidies are equivalent. *E. g.*, *Bob Jones University* v. *United States*, 461 U. S. 574, 591 (1983); *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 544 (1983). We have not treated them as equivalent, however, in the Establishment Clause context, and with good reason. "In the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, 81 Harv. L. Rev. 513, 553 (1968). In *Walz* we pointed out that the *primary* effect of a tax exemption was not to sponsor religious activity but to "restric[t] the fiscal relationship between church and state" and to "complement and reinforce the desired separation insulating each from the other." 397 U. S., at 676; see also *id.*, at 690–691 (BRENNAN, J., concurring).

Finally, and least persuasively of all, JUSTICE BRENNAN suggests that § 151.312 violates the "excessive government entanglement" aspect of *Lemon*, 403 U. S., at 613. *Ante*, at 20–21. It is plain that the exemption does not foster the sort of "comprehensive, discriminating, and continuing state surveillance" necessary to run afoul of that test. 403 U. S., at 619. A State does not excessively involve itself in religious affairs merely by examining material to determine whether it is religious or secular in nature. *Mueller* v. *Allen*, *supra*, at 403; *Meek* v. *Pittenger*, 421 U. S. 349, 359–362 (1975) (upholding loans of nonreligious textbooks to religious schools); *Board of Education of Central School Dist. No. 1* v. *Allen*, 392 U. S. 236 (1968) (same). In *Mueller*, for instance, we held that state officials' examination of textbooks to determine whether they were "books and materials used in the

teaching of religious tenets, doctrines or worship" did not constitute excessive entanglement. 463 U. S., at 403. I see no material distinction between that inquiry and the one Texas officials must make in this case. Moreover, here as in *Walz*, see 397 U. S., at 674, it is all but certain that elimination of the exemption will have the effect of *increasing* government's involvement with religion. The Court's invalidation of § 151.312 ensures that Texas churches selling publications that promulgate their religion will now be subject to numerous statutory and regulatory impositions, including audits, Tex. Tax Code Ann. § 151.023 (1982 and Supp. 1988–1989), requirements for the filing of security, § 151.251 *et seq.*, reporting requirements, § 151.401 *et seq.*, writs of attachment without bond, § 151.605, tax liens, § 151.608, and the seizure and sale of property to satisfy tax delinquencies, § 151.610.

II

Having found that this statute does not violate the Establishment Clause of the First Amendment, I must consider whether it violates the Press Clause, pursuant to our decision two Terms ago in *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221 (1987). Although I dissented in *Ragland*, even accepting it to be correct I cannot conclude as readily as does JUSTICE WHITE, *ante*, at 26, that it applies here.

The tax exemption at issue in *Ragland*, which we held to be unconstitutional because content based, applied to trade publications and sports magazines along with religious periodicals and sacred writings, and hence could not be justified as an accommodation of religion. If the purpose of accommodating religion can support action that might otherwise violate the Establishment Clause, I see no reason why it does not also support action that might otherwise violate the Press Clause or the Speech Clause. To hold otherwise would be to narrow the accommodation principle enormously, leaving it applicable to only nonexpressive religious worship. I do not

think that is the law. Just as the Constitution sometimes *requires* accommodation of religious expression despite not only the Establishment Clause but also the Speech and Press Clauses, so also it sometimes *permits* accommodation despite all those Clauses. Such accommodation is unavoidably content based—because the Freedom of Religion Clause is content based.

It is absurd to think that a State which chooses to prohibit booksellers from making stories about seduction available to children of tender years cannot make an exception for stories contained in sacred writings (*e. g.*, the story of Susanna and the Two Elders, Daniel 13:1–65). And it is beyond imagination that the sort of tax exemption permitted (indeed, required) by *Murdock* and *Follett* would have to be withdrawn if door-to-door salesmen of commercial magazines demanded equal treatment with Seventh-day Adventists on Press Clause grounds. And it is impossible to believe that the State is constitutionally prohibited from taxing Texas Monthly magazine more heavily than the Holy Bible.

* * *

Today's decision introduces a new strain of irrationality in our Religion Clause jurisprudence. I have no idea how to reconcile it with *Zorach* (which seems a much harder case of accommodation), with *Walz* (which seems precisely in point), and with *Corporation of Presiding Bishop* (on which the ink is hardly dry). It is not right—it is not constitutionally healthy—that this Court should feel authorized to refashion anew our civil society's relationship with religion, adopting a theory of church and state that is contradicted by current practice, tradition, and even our own case law. I dissent.

FORT WAYNE BOOKS, INC. *v.* INDIANA ET AL.

CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 87–470. Argued October 3, 1988—Decided February 21, 1989*

In No. 87–470, the State of Indiana and a local prosecutor (respondents) filed a civil action in state court against petitioner operator of an "adult bookstore," alleging that it had violated the state Racketeer Influenced and Corrupt Organizations (RICO) statute by engaging in a pattern of racketeering activity consisting of repeated violations of the state laws barring the distribution of obscene books and films. Respondents sought injunctive relief under the state Civil Remedies for Racketeering Activity (CRRA) statute, including forfeiture of all of petitioner's property used in the alleged racketeering activity, and moved, in a separate petition, for a court order for immediate seizure of all property subject to forfeiture, as authorized by statute. After the court, *ex parte*, heard testimony in support of this petition, it ordered the immediate seizure of petitioner's bookstore and its contents. Following petitioner's unsuccessful attempts to vacate the seizure order on federal constitutional grounds, the court certified the constitutional issues to the Indiana Court of Appeals, which held that the relevant RICO/CRRA provisions violated the Federal Constitution. The Indiana Supreme Court reversed, upholding both the constitutionality of the CRRA statute and the pretrial seizure. In No. 87–614, petitioner "adult bookstore" operator was charged with distributing obscene matter in violation of an Indiana statute (a misdemeanor) and in addition with RICO violations (felonies) based on these alleged predicate acts of obscenity. The trial court dismissed the RICO charges on the ground that the RICO statute was unconstitutionally vague as applied to obscenity predicate offenses. The Indiana Court of Appeals reversed and reinstated the charges, holding that the RICO statute was not unconstitutional as applied to the state obscenity statute, and the Indiana Supreme Court declined review.

Held:

1. This Court has jurisdiction to hear No. 87–614. Under the general rule defining finality in the context of a criminal prosecution by a judgment of conviction and the imposition of a sentence, this Court would usually conclude that since neither a conviction nor sentence was present here, the judgment below was not final and hence not reviewable under 28 U. S. C. § 1257, which limits review to "[f]inal judgments or

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*Together with No. 87–614, *Sappenfield et al.* v. *Indiana*, on certiorari to the Court of Appeals of Indiana.

decrees." But the case merits review under the exception to the general finality rule recognized in *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 482–483, "[w]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." Petitioner could well prevail on nonfederal grounds at a subsequent trial, and reversal of the Indiana Court of Appeals' holding would bar further prosecution on the RICO charges. Moreover, the case clearly involves a First Amendment challenge to the Indiana RICO statute's facial validity. Adjudicating the proper scope of First Amendment protection is a "federal policy" that merits application of an exception to the general finality rule. Resolution of the important issue of the possible limits the First Amendment places on state and federal efforts to control organized crime should not remain in doubt. *Flynt* v. *Ohio*, 451 U. S. 619, distinguished. Pp. 54–57.

2. There is no constitutional bar to the State's inclusion of substantive obscenity violations among the predicate offenses under its RICO statute. Pp. 57–60.

(a) The RICO statute is not unconstitutionally vague as applied to obscenity predicate offenses. The "racketeering activities" that the statute forbids are a "pattern" of multiple violations of certain substantive crimes, of which distributing obscenity is one. Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either. Petitioner in No. 87–614 cannot be convicted of violating the RICO statute without first being "found guilty" of distributing, or of attempting or conspiring to distribute, obscene materials. To argue, as petitioner does, that the "inherent vagueness" of the obscenity standards established by *Miller* v. *California*, 413 U. S. 15, are at the root of his objection to any RICO prosecution based on predicate acts of obscenity is nothing less than an invitation to overturn *Miller*—an invitation that this Court rejects. That the punishments available in a RICO prosecution are different from those for obscenity violations does not render the RICO statute void for vagueness. Pp. 57–58.

(b) While the RICO punishments are greater than those for obscenity violations, there is no constitutionally significant difference between them. The stiffer RICO punishments may provide an additional deterrent to those who might otherwise sell obscene materials and may result in some booksellers practicing self-censorship and removing First Amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of state obscenity laws,

and the mere assertion of some possible self-censorship resulting from a statute is not enough to render an antiobscenity law unconstitutional. Petitioner's contention in No. 87–614 that the civil sanctions available under the CRRA against RICO violations are so severe as to render the RICO statute itself unconstitutional is not ripe, since the State has not sought any civil penalties. Pp. 59–60.

(c) There is no constitutional basis for petitioner's contention in No. 87–614 that the alleged predicate acts used in a RICO/obscenity prosecution must be "affirmed convictions." As long as the standard of proof is proper with respect to all elements of the RICO allegation, including proof, beyond a reasonable doubt, of the requisite number of constitutionally proscribable predicate acts, all of the relevant constitutional requirements have been met. This Court will not require a State to fire a "warning shot" in the form of misdemeanor prosecutions before it may bring felony charges for distributing obscene materials. And there is no merit to petitioner's contention that the predicate offenses charged must have occurred in the jurisdiction where the RICO indictment is brought, not only because all of petitioner's alleged predicate acts of distributing obscenity *did* take place in the same jurisdiction where the RICO prosecution was initiated, but more significantly because such a rule would essentially turn the RICO statute on its head. Pp. 60–62.

(d) Nor is there any merit to petitioner's contention in No. 87–614 that he should have been provided with a prompt postarrest adversarial hearing on the question of the obscenity of the materials he allegedly distributed. He did not request such a hearing, and there was no seizure of any of his books or films. Police officers' purchases of a few items in connection with their investigation of petitioner's stores did not trigger constitutional concern. P. 62.

3. The pretrial seizure of petitioner's bookstore and its contents in No. 87–470 was improper. While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, books or films may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing. The risk of prior restraint, which is the underlying basis for the special Fourth Amendment protection accorded searches for, and seizures of, First Amendment materials, renders invalid the pretrial seizure here. Even assuming that petitioner's bookstore and its contents are forfeitable when it is proved that they were used in, or derived from, a pattern of violations of the state obscenity laws, the seizure was unconstitutional. Probable cause to believe that there are valid grounds for seizure is insufficient to interrupt the sale of presumptively protected books and films. Here, there was no determination that the seized items were "obscene" or that a RICO violation *had occurred*. The peti-

tion for seizure and the hearing thereon were aimed at establishing no more than *probable cause to believe* that a RICO violation had occurred, and the seizure order recited no more than probable cause in that respect. Mere probable cause to believe a violation has transpired is not adequate to remove books or film from circulation. The elements of a RICO violation other than the predicate crimes remain to be established in this case. Where the claimed RICO violation is a pattern of racketeering that can be established only by rebutting the presumption that expressive materials are protected by the First Amendment, that presumption is not rebutted until the claimed justification for seizing such materials is properly established in an adversary proceeding. Pp. 62–67.

No. 87–470, 504 N. E. 2d 559, reversed and remanded; No. 87–614, 505 N. E. 2d 504, affirmed and remanded.

WHITE, J., delivered the opinion of the Court, in Part I of which REHNQUIST, C. J., and BRENNAN, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined, in Part II–A of which REHNQUIST, C. J., and BRENNAN, STEVENS, SCALIA, and KENNEDY, JJ., joined, in Parts II–B and II–C of which REHNQUIST, C. J., and BLACKMUN, SCALIA, and KENNEDY, JJ., joined, and in Part III of which REHNQUIST, C. J., and BRENNAN, BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 68. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, *post*, p. 68. STEVENS, J., filed an opinion dissenting in No. 87–614 and concurring in part and dissenting in part in No. 87–470, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 70.

John H. Weston argued the cause for petitioners in both cases. With him on the briefs for petitioner Fort Wayne Books, Inc., were *David M. Brown*, *G. Randall Garrou*, and *Lee J. Klein*. *Richard Kammen* filed briefs for petitioners Sappenfield et al.

Stephen Goldsmith, *pro se*, argued the cause for respondents in both cases and filed a brief for himself in No. 87–470. *Linley E. Pearson*, Attorney General of Indiana, and *William E. Daily*, Deputy Attorney General, filed a brief for respondents State of Indiana et al.†

†Briefs of *amici curiae* urging reversal were filed for the American Booksellers Association, Inc., et al. by *Michael A. Bamberger* and *Jonathan B. Piper*; for the American Civil Liberties Union et al. by *Marvin*

JUSTICE WHITE delivered the opinion of the Court.‡

We have before us two decisions of the Indiana courts, involving the application of that State's Racketeer Influenced and Corrupt Organizations (RICO) and Civil Remedies for Racketeering Activity (CRRA) Acts to cases involving bookstores containing allegedly obscene materials.

I

The two causes before us arise from wholly unrelated incidents.

A

Petitioner in No. 87–470, Fort Wayne Books, Inc., and two other corporations[1] each operated an "adult bookstore" in Fort Wayne, Indiana. On March 19, 1984, the State of Indiana and a local prosecutor, respondents here, filed a civil action against the three corporations and certain of their em-

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E. Frankel, Jeffrey S. Trachtman, John A. Powell, Steven R. Shapiro, and *Richard A. Waples;* for PHE, Inc., by *Bruce J. Ennis, Jr.,* and *David W. Ogden;* and for the Video Software Dealers Association by *Charles B. Ruttenberg* and *Theodore D. Frank.*

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Fried, Acting Assistant Attorney General Dennis, Deputy Solicitor General Bryson,* and *Michael K. Kellogg;* for Robert K. Corbin, Attorney General of Arizona, by *Mr. Corbin, pro se,* and *Bruce A. Taylor;* for Tom Collins, County Attorney of the County of Maricopa, Arizona, by *Benjamin W. Bull;* for Morality in Media, Inc., by *John J. Walsh* and *Paul J. McGeady;* and for James J. Clancy et al. by *Mr. Clancy, pro se.*

Briefs of *amici curiae* were filed for Spartacist League et al. by *Rachel H. Wolkenstein;* and for the National District Attorneys' Association by *G. Robert Blakey.*

‡JUSTICE BRENNAN joins only Parts I, II–A, and III of this opinion, and JUSTICE STEVENS joins only Parts I and II–A.

[1] In addition to petitioner Fort Wayne Books, Inc., the Fort Wayne proceedings involved Cinema Blue of Fort Wayne, Inc., and Erotica House Bookstore, Inc. See App. 7.

These other entities did not seek certiorari or enter an appearance in this Court. We therefore deal only with the claims and issues raised by Fort Wayne Books, Inc.

ployees alleging that defendants had engaged in a pattern of racketeering activity by repeatedly violating the state laws barring the distribution of obscene books and films, thereby violating the State's RICO law.[2] The complaint recited 39 criminal convictions for selling obscene publications from the three stores. App. 9–37. It was also alleged that there were currently other obscene materials available for sale in the stores. *Id.*, at 37–44. The proceeds from the sales of obscene materials, it was alleged, were being used to operate and maintain the bookstores. Respondents sought civil injunctive relief to bar further racketeering violations, invoking the State's CRRA statute, Ind. Code § 34–4–30.5–1 *et seq.* (1988). Among the remedies requested in the complaint was forfeiture of all of Fort Wayne Books' property, real and personal, that "was used in the course of, intended for use in the course of, derived from, or realized through" petitioner's "racketeering activity." App. 47. Such forfeiture is authorized by the CRRA statute. Ind. Code § 34–4–30.5–3(a) (1988).

Respondents also moved, in a separate "Verified Petition for Seizure of Property Subject to Forfeiture," for the particular judicial order that is the subject of our consideration here. Specifically, respondents asked the Allen County Circuit Court "to immediately seize . . . all property 'subject to forfeiture' as set forth in [the CRRA] complaint." App. 51. Such pretrial seizures are authorized under Ind. Code § 34–4–30.5–3(b) (1988), which empowers prosecutors bringing CRRA actions to move for immediate seizure of the property subject to forfeiture, and permits courts to issue seizure orders "upon a showing of probable cause to believe that a violation of [the State's RICO law] involving the property in question has occurred." The seizure petition was supported

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[2] A 1984 amendment to the state RICO law had added obscenity violations to the list of predicate offenses deemed to constitute "racketeering activity" under Indiana law. See Ind. Code § 35–45–6–1 (1988).

by an affidavit executed by a local police officer, recounting the 39 criminal convictions involving the defendants, further describing various other books and films available for sale at petitioner's bookstores and believed by affiant to be obscene, and alleging a conspiracy among several of petitioner's employees and officers who had previous convictions for obscenity offenses. App. 55–78.

The trial court, *ex parte*, heard testimony in support of the petition and had supporting exhibits before it. On the same day, the court entered an order finding that probable cause existed to conclude that Fort Wayne Books was violating the State RICO law, and directing the immediate seizure of the real estate, publications, and other personal property comprising each of the three bookstores operated by the corporate defendants. *Id.*, at 81–83. The court's order authorized the county sheriff to padlock the stores. This was done, and a few days later, the contents of the stores were hauled away by law enforcement officials. No trial date on the CRRA complaint was ever set.

Following the March 1984 seizure of the bookstores, Fort Wayne Books sought to vacate the *ex parte* seizure order. An adversarial hearing on a motion to vacate the order based on federal constitutional grounds failed to yield relief. Other efforts to obtain some measure of relief also failed. The trial court did, however, certify the constitutional issues to the Indiana Court of Appeals. In June 1985, that court held that the relevant RICO/CRRA provisions were violative of the United States Constitution. *4447 Corp.* v. *Goldsmith*, 479 N. E. 2d 578 (Ind. App.).[3] The Indiana Supreme Court re-

[3] The Indiana Court of Appeals had consolidated the *Fort Wayne Books* case with another case arising from a CRRA action brought in Indianapolis, *4447 Corp.* v. *Goldsmith*. The Indiana Supreme Court also heard these cases on a consolidated basis, issuing a single judgment upholding both seizures.

Only Fort Wayne Books, Inc., petitioned for review of the decision below. See Pet. for Cert. in No. 87–470, p. iv. Officials of the 4447 Corporation have never expressed any interest in the proceedings here, and

versed, upholding the constitutionality of the CRRA statute as a general proposition and the pretrial seizure of Fort Wayne Books' store as a specific matter. *4447 Corp.* v. *Goldsmith*, 504 N. E. 2d 559 (1987).

We granted Fort Wayne's petition for certiorari, 485 U. S. 933 (1988), for the purpose of considering the substantial constitutional issues raised by the pretrial seizure.

B

In No. 87–614, an investigation of adult bookstores in Howard County, Indiana, led prosecutors there, in April 1985, to charge petitioner Sappenfield with six counts of distribution of obscene matter, in violation of Ind. Code § 35–49–3–1 (1988). In addition, employing the 1984 amendments to the Indiana RICO statute discussed above, prosecutors used these alleged predicate acts of obscenity as a basis for filing two charges of RICO violations against petitioner. App. 142–143, 148–149. The obscenity charges were Class A misdemeanors under Indiana law, the racketeering offenses Class C felonies.

The trial court dismissed the two RICO counts on the ground that the RICO statute was unconstitutionally vague as applied to obscenity predicate offenses. The Indiana Court of Appeals reversed and reinstated the charges against petitioner. Relying on the Indiana Supreme Court's opinion under review here in No. 87–470, *4447 Corp.* v. *Goldsmith*, *supra*, the Court of Appeals held that "Indiana's RICO statute is not unconstitutional as applied to the State's obscenity statute." 505 N. E. 2d 504, 506 (1987). The Indiana Supreme Court declined to review this holding of the Indiana Court of Appeals.

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several factual aspects of that case brought to our attention during Argument, see Tr. of Oral Arg. 53, suggest that it may be moot. In any event, we address only the claims and issues presented by Fort Wayne Books, Inc.

We granted certiorari, 485 U. S. 933 (1988), and consolidated this case with No. 87–470, to consider the common and separate issues presented by both cases.

II

Since it involves challenges to the constitutionality of the Indiana RICO statute, we deal first with No. 87–614.

As noted above, petitioner was charged with six substantive obscenity violations and two RICO offenses. App. 138–149. Petitioner challenged only the latter charges, raising no objection to the obscenity indictments. *Id.*, at 150. He makes no claim here that the Constitution bars a criminal prosecution for distributing obscene materials.[4] Rather, petitioner's claim is that certain particulars of the Indiana RICO law render the prosecution of petitioner under *that* statute unconstitutional. Petitioner advances several specific attacks on the RICO statute.

A

Before we address the merits of petitioner's claims, we must first consider our jurisdiction to hear this case. The relevant statute, 28 U. S. C. § 1257, limits our review to "[f]inal judgments or decrees" of the state courts. The general rule is that finality in the context of a criminal prosecution is defined by a judgment of conviction and the imposition of a sentence. See *Parr* v. *United States*, 351 U. S. 513, 518 (1956); *Berman* v. *United States*, 302 U. S. 211, 212 (1937). Since neither is present here, we would usually conclude that the judgment below is not final and is hence unreviewable.

There are, however, exceptions to the general rule. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975). *Cox*

[4] The constitutionality of criminal sanctions against those who distribute obscene materials is well established by our prior cases. See, *e. g.*, *Pinkus* v. *United States*, 436 U. S. 293, 303–304 (1978); *Splawn* v. *California*, 431 U. S. 595, 597–599 (1977); *Miller* v. *California*, 413 U. S. 15, 23–26 (1973); *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 441 (1957).

identified four categories of cases in which a judgment is final even though further proceedings are pending in the state courts. This case fits within the fourth category of cases described in *Cox:*

> "[W]here the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . in the state court proceedings still to come. In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for the purposes of the state litigation." *Id.*, at 482–483.

This case clearly satisfies the first sentence of the above-cited passage: petitioner could well prevail on nonfederal grounds at a subsequent trial, and reversal of the Indiana Court of Appeals' holding would bar further prosecution on the RICO counts at issue here. Thus, the only debatable question is whether a refusal to grant immediate review of petitioner's claims "might seriously erode federal policy." *Ibid.*

Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a "federal policy" that merits application of an exception to the general finality rule. See, *e. g.*, *National Socialist Party of America* v. *Skokie*, 432 U. S. 43, 44 (1977) *(per curiam); Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 246–247 (1974). Petitioner's challenge to the constitutionality of the use of RICO statutes to criminalize patterns of obscenity offenses calls into question the legitimacy of the law enforcement practices of several States, as well as the Federal Gov-

ernment.[5] Resolution of this important issue of the possible limits the First Amendment places on state and federal efforts to control organized crime should not remain in doubt. "Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture [of the state statute in question] could only further harm the operation of a free press." *Tornillo*, *supra*, at 247, n. 6.

JUSTICE O'CONNOR contends that a contrary result is counseled here by our decision in *Flynt* v. *Ohio*, 451 U. S. 619 (1981) *(per curiam)*. *Post*, at 69–70. But as the Court understood it, "[t]he question presented for review [in *Flynt* was] whether on [that] record the decision to prosecute petitioners was selective or discriminatory *in violation of the Equal Protection Clause*." *Flynt*, *supra*, at 622 (emphasis added). The claim before us in *Flynt* was not a First Amendment claim, but rather an equal protection claim (albeit one in the context of a trial raising First Amendment issues). As a result, *Cox*'s fourth exception was held to be inapplicable in that case. Though the dissenters in *Flynt* disagreed with the premise of the Court's holding, and contended that that case was a First Amendment dispute that demanded immediate attention under *Cox*'s fourth exception, see 451 U. S., at 623 (Stewart, J., dissenting); *id.*, at 623–624 (STEVENS, J.,

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[5] The Federal RICO statute also permits prosecutions for a pattern of obscenity violations, in a manner quite similar to the Indiana law under review here. See 18 U. S. C. § 1961(1) (1982 ed., Supp. IV). Thus, the "outcome of this case may . . . determine the constitutionality of using obscenity crimes as predicate acts in the federal RICO statute." See Brief for United States as *Amicus Curiae* 2.

In addition, several States have followed Congress' lead, and have added obscenity-related offenses to the list of predicate offenses that can give rise to violations of their state RICO laws. See, *e. g.*, Ariz. Rev. Stat. Ann. § 13–2301 (Supp. 1988–1989); Ind. Code § 35–45–6–1 (1988); Ga. Code Ann. § 16–14–3(3)(A)(xii) (1988); Conn. Gen. Stat. § 53–394 (1985); Cal. Penal Code Ann. § 186.2(a)(19) (West 1988).

dissenting), the fact is that no Member of the Court concluded in *Flynt*—as JUSTICE O'CONNOR does today—that where an important First Amendment claim *is* before us, the Court should refuse to invoke *Cox*'s fourth exception and hold that we have no authority to address the issue.

Consequently, we conclude that this case, which clearly involves a First Amendment challenge to the facial validity of the Indiana RICO statute, merits review under the fourth exception recognized by *Cox* to the finality rule.

B

Petitioner's broadest contention is that the Constitution forbids the use of obscenity violations as predicate acts for a RICO conviction. Petitioner's argument in this regard is twofold: first, that the Indiana RICO law, as applied to an "enterprise" that has allegedly distributed obscene materials, is unconstitutionally vague; and second, that the potential punishments available under the RICO law are so severe that the statute lacks a "necessary sensitivity to first amendment rights," Brief for Petitioner in No. 87–614, p. 23. We consider each of these arguments in turn.

(1)

The "racketeering activities" forbidden by the Indiana RICO law are a "pattern" of multiple violations of certain substantive crimes, of which distributing obscenity (Ind. Code § 35–49–3–1) is one. Ind. Code § 35–45–6–1 (1988). Thus, the RICO statute at issue wholly incorporates the state obscenity law by reference.

Petitioner argues that the "inherent vagueness" of the standards established by *Miller* v. *California*, 413 U. S. 15 (1973), are at the root of his objection to any RICO prosecution based on predicate acts of obscenity. Brief for Petitioner in No. 87–614, pp. 24–33. Yet, this is nothing less than an invitation to overturn *Miller*—an invitation that we reject. And we note that the Indiana obscenity statute, Ind. Code § 35–49–1–1 *et seq.* (1988), is closely tailored to conform

to the *Miller* standards. Cf. *Sedelbauer* v. *State*, 428 N. E. 2d 206, 210–211 (Ind. 1981), cert. denied, 455 U. S. 1035 (1982).[6] Moreover, petitioner's motion to dismiss the RICO charges in the trial court rested on the alleged vagueness of *that* statute, and not any alleged defect in the underlying obscenity law. See App. 150–151, 161–167.

We find no merit in petitioner's claim that the Indiana RICO law is unconstitutionally vague as applied to obscenity predicate offenses. Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either. At petitioner's forthcoming trial, the prosecution will have to prove beyond a reasonable doubt each element of the alleged RICO offense, including the allegation that petitioner violated (or attempted or conspired to violate) the Indiana obscenity law. Cf. Ind. Code § 35–45–6–1 (1988); 504 N. E. 2d, at 566. Thus, petitioner cannot be convicted of violating the RICO law without first being "found guilty" of two counts of distributing (or attempting to, or conspiring to, distribute) obscene materials.

It is true, as petitioner argues, Brief for Petitioner in No. 87–614, pp. 16–18, that the punishments available in a RICO prosecution are different from those for obscenity violations. But we fail to see how this difference renders the RICO statute void for *vagueness*.[7]

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[6] The definition of obscenity found in the relevant statute provides that a book or film (a "matter," in the law's parlance) is obscene if:

"(1) the average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex;

"(2) the matter or performance depicts or describes, in a patently offensive way, sexual conduct; and

"(3) the matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value." Ind. Code § 35–49–2–1 (1988).

Cf. *Pope* v. *Illinois*, 481 U. S. 497, 501–502, n. 4 (1987); *Miller* v. *California*, 413 U. S., at 25–26.

[7] Indeed, because the scope of the Indiana RICO law is more limited than the scope of the State's obscenity statute—with obscenity-related

(2)

Petitioner's next contention rests on the difference between the sanctions imposed on obscenity law violators and those imposed on convicted "racketeers": the sanctions imposed on RICO violators are so "draconian" that they have an improper chilling effect on First Amendment freedoms, petitioner contends. See *id.*, at 12, 17. The use of such "heavy artillery" from the "war on crime" against obscenity is improper, petitioner argues, and therefore, obscenity offenses should not be permitted to be used as predicate acts for RICO purposes.

It is true that the criminal penalties for a RICO violation under Indiana law, a Class C felony, are more severe than those authorized for an obscenity offense, a Class A misdemeanor. Specifically, if petitioner is found guilty of the two RICO counts against him, he faces a maximum sentence of 10 years in prison and a $20,000 fine; if petitioner were convicted instead of only the six predicate obscenity offenses charged in the indictments, the maximum punishment he could face would be six years in jail and $30,000 in fines. Compare Ind. Code § 35–50–2–6 (1988), with Ind. Code § 35–50–3–2 (1988). While the RICO punishment is obviously greater than that for obscenity violations, we do not perceive any constitutionally significant difference between the two potential punishments.[8] Indeed, the Indiana RICO provisions in this respect function quite similarly to an en-

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RICO prosecutions possible only where one is guilty of a "pattern" of obscenity violations—it would seem that the RICO statute is inherently *less* vague than any state obscenity law: a prosecution under the RICO law will be possible only where all the elements of an obscenity offense are present, and then some.

[8] We have in the past upheld the constitutionality of statutes that provide criminal penalties for obscenity offenses that are not significantly different from those provided in the Indiana RICO law. See, *e. g.*, *Smith* v. *United States*, 431 U. S. 291, 296, n. 3 (1977) (5-year prison term and $5,000 fine for first offense; 10-year term and $10,000 fine for each subsequent violation); *Ginzburg* v. *United States*, 383 U. S. 463, 464–465, n. 2 (1966) (5-year prison term and $5,000 fine).

hanced sentencing scheme for multiple obscenity violations. As such, "[i]t is not for this Court . . . to limit the State in resorting to various weapons in the armory of the law." *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 441 (1957).

It may be true that the stiffer RICO penalties will provide an additional deterrent to those who might otherwise sell obscene materials; perhaps this means—as petitioner suggests, Brief for Petitioner in No. 87–614, pp. 20–22—that some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene." *Smith* v. *California*, 361 U. S. 147, 154–155 (1959). Cf. also *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697, 706 (1986). The mere assertion of some possible self-censorship resulting from a statute is not enough to render an antiobscenity law unconstitutional under our precedents.

Petitioner further raises the question whether the civil sanctions available against RICO violations—under the CRRA statute—are so severe as to render the RICO statute itself unconstitutional. See, *e. g.*, Brief for Petitioner in No. 87–614, pp. 22–23. However, this contention is not ripe, since the State has not sought any civil penalties in this case. These claims can only be reviewed when (or if) such remedies are enforced against petitioner.

Consequently, we find no constitutional bar to the State's inclusion of substantive obscenity violations among the predicate offenses under its RICO statute.

C

Finally, petitioner advances two narrower objections to the application of the Indiana RICO statute in obscenity-related prosecutions.

(1)

First, petitioner contends that even if the statute is constitutional on its face, "the First Amendment . . . requires that predicate obscenity offenses must be affirmed convictions on successive dates . . . in the same jurisdiction as that where the RICO charge is brought." *Id.*, at 33.

We find no constitutional basis for the claim that the alleged predicate acts used in a RICO/obscenity prosecution must be "affirmed convictions." We rejected a like contention, albeit in dicta, when considering a case under the Federal RICO statute. See *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 488 (1985). We see no reason for a different rule where the alleged predicate acts are obscenity. As long as the standard of proof is the proper one with respect to all of the elements of the RICO allegation—including proof, beyond a reasonable doubt, of the requisite number of constitutionally proscribable predicate acts—all of the relevant constitutional requirements have been met. The analogy suggested by the United States in its *amicus* brief is apt: "This Court has never required a State to fire warning shots, in the form of misdemeanor prosecutions, before it may bring felony charges for distributing obscene materials." Brief for United States as *Amicus Curiae* 16. We likewise decline to impose such a "warning shot" requirement here.

The second aspect of this claim—that all of the predicate offenses charged must have occurred in the jurisdiction where the RICO indictment is brought—also lacks merit. This contention must be rejected in this case, if for no other reason than the fact that all of petitioner's alleged predicate acts of distributing obscenity *did* take place in the same jurisdiction (Howard County) where the RICO prosecution was initiated; petitioner lacks standing to advance this claim on these facts. See App. 138–149. More significantly, petitioner's suggestion fails because such a rule would essentially turn the RICO statute on its head: barring RICO prosecutions of large national enterprises that commit single predicate offenses in numerous jurisdictions, for example.

Of course, petitioner is correct when he argues that "community standards" may vary from jurisdiction to jurisdiction where different predicate obscenity offenses allegedly were committed. But as long as, for example, each previous obscenity conviction was measured by the appropriate community's standard, we see no reason why the RICO prosecution—alleging a pattern of such violations—may take place only in a jurisdiction where two or more such offenses have occurred. Cf. *Smith* v. *United States*, 431 U. S. 291, 306–309 (1977).

(2)

Second, petitioner contends that he should have been provided with a prompt adversarial hearing, shortly after his arrest, on the question of the obscenity of the materials he allegedly distributed. Brief for Petitioner in No. 87–614, pp. 36–37.

This contention lacks merit for several reasons. First, it does not appear that petitioner requested such a hearing below. See App. 135–137. Second, unlike No. 87–470, in this case, there was no seizure of any books or films owned by petitioner. The only expressive materials "seized" by Howard County officials in this case were a few items purchased by police officers in connection with their investigation of petitioner's stores. See *id.*, at 138–147. We have previously rejected the argument that such purchases trigger constitutional concerns. See *Maryland* v. *Macon*, 472 U. S. 463, 468–471 (1985).

We consequently affirm the judgment in No. 87–614.

III

We reverse, however, the judgment in No. 87–470 sustaining the pretrial seizure order.

In a line of cases dating back to *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961), this Court has repeatedly held that rigorous procedural safeguards must be employed before expressive materials can be seized as "obscene." In *Marcus*,

and again in *A Quantity of Copies of Books* v. *Kansas*, 378 U. S. 205 (1964), the Court invalidated large-scale confiscations of books and films, where numerous copies of selected books were seized without a prior adversarial hearing on their obscenity. In those cases, and the ones that immediately came after them, the Court established that pretrial seizures of expressive materials could only be undertaken pursuant to a "procedure 'designed to focus searchingly on the question of obscenity.'" *Id.*, at 210 (quoting *Marcus*, *supra*, at 732). See also, *e. g.*, *Lee Art Theatre, Inc.* v. *Virginia*, 392 U. S. 636 (1968).

We refined that approach further in our subsequent decisions. Most importantly, in *Heller* v. *New York*, 413 U. S. 483, 492 (1973), the Court noted that "seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding." As a result, we concluded that until there was a "judicial determination of the obscenity issue in an adversary proceeding," exhibition of a film could not be restrained by seizing all the available copies of it. *Id.*, at 492–493. The same is obviously true for books or any other expressive materials. While a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause, the publication may not be taken out of circulation completely until there has been a determination of obscenity after an adversary hearing. *Ibid.*; see *New York* v. *P. J. Video, Inc.*, 475 U. S. 868, 874–876 (1986).

Thus, while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved. *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 326, n. 5 (1979). It is "[t]he risk of prior re-

straint, which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizure of First Amendment materials" that motivates this rule. *Maryland* v. *Macon*, *supra*, at 470. These same concerns render invalid the pretrial seizure at issue here.[9]

In its decision below, the Indiana Supreme Court did not challenge our precedents or the limitations on seizures that our decisions in this area have established. Rather, the court found those rules largely inapplicable in this case. 504 N. E. 2d, at 564–567. The court noted that the alleged predicate offenses included 39 convictions for violating the State's obscenity laws[10] and observed that the pretrial seizures (which were made in strict accordance with Indiana law) were not based on the nature or suspected obscenity of the contents of the items seized, but upon the neutral ground that the sequestered property represented assets used and acquired in the course of racketeering activity. "The rem-

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[9] Following its ruling for petitioner, the Indiana Court of Appeals certified two questions for review to the Indiana Supreme Court:

"(a) Does the application for seizure upon probable cause shown ex parte as provided for by I. C. 34–4–30.5–3(b) violate due process guarantees provided by the Indiana and United States Constitutions.

"(b) Is the Order of seizure issued March 19, 1984, which is based upon enumerated criminal convictions a violation of the First Amendment." Record 700.

The Indiana Supreme Court answered both of these questions in the negative. *4447 Corp.* v. *Goldsmith*, 504 N. E. 559, 566–567 (1987). Because we dispose of petitioner's claims on First Amendment grounds, we need not reach any due process questions that may be involved in this case.

[10] Respondent suggested at argument, see Tr. of Oral Arg. 43, 53, that the fact that petitioner (and/or those employed by petitioner) had numerous prior *convictions* for obscenity offenses sufficed to justify this pretrial seizure even if it were otherwise impermissible. But the state trial court did not purport to impose the seizure as a punishment for the past criminal acts (even if such a punishment were permissible under the First Amendment). Instead, as noted above, the seizure was undertaken to prevent future violations of Indiana's RICO laws; as a prospective, pretrial seizure, it was required to comply with the *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961), line of cases, which (as we explain below) it did not.

edy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply, it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene." *Id.*, at 565. The court also specifically rejected petitioner's claim that the legislative inclusion of violations of obscenity laws as a form of racketeering activity was "merely a semantic device intended to circumvent well-established First Amendment doctrine." *Id.*, at 564. The assets seized were subject to forfeiture "if the elements of a pattern of racketeering activity are shown," *ibid.*; there being probable cause to believe this was the case here, the pretrial seizure was permissible, the Indiana Supreme Court concluded.

We do not question the holding of the court below that adding obscenity-law violations to the list of RICO predicate crimes was not a mere ruse to sidestep the First Amendment. And for the purpose of disposing of this case, we assume without deciding that bookstores and their contents are forfeitable (like other property such as a bank account or a yacht) when it is proved that these items are property actually used in, or derived from, a pattern of violations of the State's obscenity laws.[11] Even with these assumptions, though, we find the seizure at issue here unconstitutional. It is incontestable that these proceedings were begun to put an end to the sale of obscenity at the three bookstores named in the complaint, and hence we are quite sure that the special rules applicable to removing First Amendment materials from circulation are relevant here. This includes specifically

[11] Contrary to petitioner's urging, see Brief for Petitioner in No. 87–470, pp. 44–45, we do not reach the question of the constitutionality of post-trial forfeiture—or any other civil post-trial sanction authorized by the Indiana RICO/CRRA laws—in this context. The case before us does not involve such a forfeiture, and we see no reason to depart from our usual practice of deciding only "'concrete legal issues, presented in actual cases . . . .'" *Public Workers* v. *Mitchell*, 330 U. S. 75, 89 (1947); see also *Electric Bond & Share Co.* v. *SEC*, 303 U. S. 419, 443 (1938).

the admonition that probable cause to believe that there are valid grounds for seizure is insufficient to interrupt the sale of presumptively protected books and films.

Here there was not—and has not been—any determination that the seized items were "obscene" or that a RICO violation *has occurred.* True, the predicate crimes on which the seizure order was based had been adjudicated and are unchallenged. But the petition for seizure and the hearing thereon were aimed at establishing no more than *probable cause to believe* that a RICO violation had occurred, and the order for seizure recited no more than probable cause in that respect. As noted above, our cases firmly hold that mere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation. See, *e. g.*, *New York* v. *P. J. Video, Inc.*, 475 U. S. 868 (1986); *Heller* v. *New York*, 413 U. S. 483 (1973). The elements of a RICO violation other than the predicate crimes remain to be established in this case; *e. g.*, whether the obscenity violations by the three corporations or their employees established a pattern of racketeering activity, and whether the assets seized were forfeitable under the State's CRRA statute. Therefore, the pretrial seizure at issue here was improper.

The fact that respondent's motion for seizure was couched as one under the Indiana RICO law—instead of being brought under the substantive obscenity statute—is unavailing. As far back as the decision in *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 720–721 (1931), this Court has recognized that the way in which a restraint on speech is "characterized" under state law is of little consequence. See also *Schad* v. *Mount Ephraim*, 452 U. S. 61, 67–68 (1981); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 552–555 (1975). For example, in *Vance* v. *Universal Amusement Co.*, 445 U. S. 308 (1980) *(per curiam)*, we struck down a prior restraint placed on the exhibitions of films under a Texas "public nuisance" statute, finding that its failure to

comply with our prior case law in this area was a fatal defect. Cf. also *Arcara* v. *Cloud Books, Inc.*, 478 U. S., at 708 (O'CONNOR, J., concurring) (noting that if a "city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books . . . the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review"). While we accept the Indiana Supreme Court's finding that Indiana's RICO law is not "pretextual" as applied to obscenity offenses, it is true that the State cannot escape the constitutional safeguards of our prior cases by merely recategorizing a pattern of obscenity violations as "racketeering."

At least where the RICO violation claimed is a pattern of racketeering that can be established only by rebutting the presumption that expressive materials are protected by the First Amendment,[12] that presumption is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding. Here, literally thousands of books and films were carried away and taken out of circulation by the pretrial order. See App. 87; Record 601–627. Yet it remained to be proved whether the seizure was actually warranted under the Indiana CRRA and RICO statutes. If we are to maintain the regard for First Amendment values expressed in our prior decisions dealing with interrupting the flow of expressive materials, the judgment of the Indiana Court must be reversed.[13]

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[12] We do not hold today that the pretrial seizure of petitioner's nonexpressive property was invalid. Petitioner did not challenge this aspect of the seizure here.

[13] Although it is of no direct significance, we note that the Federal Government—which has a RICO statute similar to Indiana's, 18 U. S. C. § 1961 *et seq.*—does not pursue pretrial seizure of expressive materials in its RICO actions against "adult bookstores" or like operations. See Brief

IV

For the reasons given above, the judgment in No. 87–470 is reversed, and the case is remanded for further proceedings. The judgment in No. 87–614 is affirmed, and it too is remanded for further proceedings.

It is so ordered.

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

Although I agree with JUSTICE O'CONNOR in her conclusion that the *Sappenfield* case, No. 87–614, is not properly here under 28 U. S. C. § 1257, a majority of the Court has decided otherwise. This majority on the jurisdictional issue, however, is divided 4 to 3 on the merits of the question presented in *Sappenfield:* whether the distribution of constitutionally obscene materials may be punished as predicate acts of a racketeering offense. Disposition of the case deserves—if not requires—a majority of participating Justices. See *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result).

Thus, notwithstanding my dissenting jurisdictional view, I feel obligated to reach the merits in *Sappenfield.* See *United States* v. *Vuitch*, 402 U. S. 62, 97–98 (1971) (separate statement). Because I agree that what may be punished under *Miller* v. *California*, 413 U. S. 15 (1973), may form the basis of a racketeering conviction, I join JUSTICE WHITE's opinion (except for Part II–A) and the judgment of the Court.

JUSTICE O'CONNOR, concurring in part and dissenting in part.

Because I believe that this Court does not have jurisdiction to hear the petition in *Sappenfield* v. *Indiana*, No. 87–614, I dissent from the Court's disposition of that case. I concur in

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for United States as *Amicus Curiae* 15, n. 12; cf. *United States* v. *Pryba*, 674 F. Supp. 1504, 1508, n. 16 (ED Va. 1987).

the Court's disposition of *Fort Wayne Books, Inc.* v. *Indiana*, No. 87–470, which presents, among others, the same question as presented in *Sappenfield*.

Petitioners Sappenfield and his bookstore corporations, Fantasy One, Inc., and Fantasy Two, Inc., have yet to be tried or convicted on the Racketeer Influenced and Corrupt Organizations (RICO) counts brought against them by the State of Indiana. Petitioners' motion to dismiss the RICO counts and the State's subsequent appeal were, therefore, interlocutory. Except in limited circumstances, this Court has jurisdiction only to review final judgments rendered by the highest court of the State in which decision may be had. 28 U. S. C. § 1257. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975). As we observed in *Flynt* v. *Ohio*, 451 U. S. 619, 620 (1981) *(per curiam)*, a case involving violations of Ohio's obscenity statute, "[a]pplied in the context of a criminal prosecution, finality is normally defined by the imposition of the sentence." Neither a finding of guilt nor imposition of sentence has yet occurred in *Sappenfield*. As in *Flynt*, were we to assume jurisdiction over *Sappenfield*, there would be some "probability of piecemeal review with respect to federal issues [because] [i]t appears that other federal issues will be involved in the trial court, such as whether or not the publication[s] at issue [are] obscene." 451 U. S., at 621. Similarly, as in *Flynt*, "delaying review until petitioners are convicted, if they are, would [not] seriously erode federal policy within the meaning of our prior cases. . . . That this case involves an obscenity prosecution does not alter the conclusion." *Id.*, at 622. The Court's assumption of jurisdiction based on its determination that "[a]djudicating the proper scope of First Amendment protections . . . merits application of an exception to the general finality rule," *ante*, at 55, essentially expands the fourth *Cox* exception to permit review of any state interlocutory orders implicating the First Amendment. Such a broad expansion of the narrow excep-

tions to the statutory limitations on our jurisdiction is completely unwarranted. Ironically, the petition in *Fort Wayne Books* makes this expansion unnecessary as well. Accordingly, I would dismiss the writ of certiorari in *Sappenfield* for want of jurisdiction.

The petition in *Fort Wayne Books* is also from an interlocutory appeal to the Indiana appellate courts. In this case, however, pretrial sanctions have already been imposed on petitioner. Where First Amendment interests are actually affected, we have held that such interlocutory orders are immediately reviewable by this Court. *National Socialist Party of America* v. *Skokie*, 432 U. S. 43 (1977) *(per curiam)*. Although *Fort Wayne Books* is a civil action brought under Indiana's Civil Remedies for Racketeering Activity statute, such civil actions depend on pre-existing violations of the State's criminal RICO statute. See *ante*, at 50–51. Consequently, the question presented in *Sappenfield*—whether violations of Indiana's obscenity statute may be predicate acts for charges brought under the State's criminal RICO statute—is also presented in *Fort Wayne Books*. Were it unconstitutional for Indiana to include obscenity violations among possible predicate acts for RICO violations, the civil remedies sought in *Fort Wayne Books* would be equally invalid. I fully agree with the Court's disposition of this question as it applies to *Fort Wayne Books*. There is "no constitutional bar to the State's inclusion of substantive obscenity violations among the predicate offenses under its RICO statute." *Ante*, at 60. I also agree and concur with the Court's statement of the cases in Part I and its disposition in Part III of the separate questions presented in *Fort Wayne Books*.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting in No. 87–614, and concurring in part and dissenting in part in No. 87–470.

The Court correctly decides that we have jurisdiction and that the pretrial seizures to which petitioner in No. 87–470

was subjected are unconstitutional. But by refusing to evaluate Indiana's Racketeer Influenced and Corrupt Organizations (RICO) and Civil Remedies for Racketeering Activity (CRRA) statutes as an interlinked whole, the Court otherwise reaches the wrong result.

It is true that a bare majority of the Court has concluded that delivery of obscene messages to consenting adults may be prosecuted as a crime.[1] The Indiana Legislature has

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[1] Each of the cases the Court cites to demonstrate that this proposition is "well established," *ante*, at 54, n. 4, was decided by a 5-to-4 vote. The dissenters in *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436 (1957), were Chief Justice Warren and Justices Black, Douglas, and BRENNAN; in *Miller* v. *California*, 413 U. S. 15 (1973), Justices Douglas, BRENNAN, Stewart, and MARSHALL dissented. In *Splawn* v. *California*, 431 U. S. 595 (1977), and *Pinkus* v. *United States*, 436 U. S. 293 (1978), Justices BRENNAN, Stewart, MARSHALL, and STEVENS expressed the opinion that criminal prosecution for obscenity-related offenses violates the First Amendment.

In 1970, moreover, the President's Commission on Obscenity and Pornography advocated that laws regulating adults' access to sexually explicit materials be repealed. Report of The Commission on Obscenity and Pornography 51–56 (1970). The most recent federal pornography commission disagreed with this conclusion yet acknowledged that scholarly comment generally agrees with the dissenters:

"Numerous people, in both oral and written evidence, have urged upon us the view that the Supreme Court's approach is a mistaken interpretation of the First Amendment. They have argued that we should conclude that any criminal prosecution based on the distribution to consenting adults of sexually explicit material, no matter how offensive to some, and no matter how hard-core, and no matter how devoid of literary, artistic, political, or scientific value, is impermissible under the First Amendment.

"We have taken these arguments seriously. In light of the facts that the Supreme Court did not in *Roth* [v. *United States*, 354 U. S. 476 (1957)] or since unanimously conclude that obscenity is outside of the coverage of the First Amendment, and that its 1973 rulings [*Miller* v. *California*, 413 U. S. 15; *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49; *Kaplan* v. *California*, 413 U. S. 115; *United States* v. *12 200-ft. Reels of Film*, 413 U. S. 123; *United States* v. *Orito*, 413 U. S. 139] were all decided by a scant 5–4 majority on this issue, there is no doubt that the issue was debatable within the Supreme Court, and thus could hardly be without difficulty. Moreover, we recognize that the bulk of scholarly commentary is of the opinion that the Supreme Court's resolution of and basic approach

done far more than that: by injecting obscenity offenses into a statutory scheme designed to curtail an entirely different kind of antisocial conduct, it has not only enhanced criminal penalties, but also authorized wide-ranging civil sanctions against both protected and unprotected speech. In my judgment there is a vast difference between the conclusion that a State may proscribe the distribution of obscene materials and the notion that this legislation can survive constitutional scrutiny.

I

At the outset it is important to identify the limited nature of the "racketeering activity" alleged in No. 87–614. Petitioner is accused of selling to the same willing purchaser three obscene magazines in each of two stores. There is no charge that anyone engaged in any sexual misconduct on petitioner's premises,[2] that his stores displayed or advertised their inventory in an offensive way,[3] that children were given access to any of their publications or films,[4] or that they foisted any obscene messages upon unwilling recipients.[5] There is no claim that petitioner's bookstores are public nuisances operating in inappropriate places, manners, or times.[6]

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to the First Amendment issues is incorrect." 1 Attorney General's Commission on Pornography, Final Report 260–261 (July 1986) (hereinafter Report).

[2] See, *e. g.*, *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697 (1986).

[3] See *Splawn* v. *California*, 431 U. S., at 602 (STEVENS, J., dissenting); *Commonwealth* v. *American Booksellers Assn., Inc.*, 236 Va. 168, 372 S. E. 2d 618 (1988), answering questions certified in 484 U. S. 383 (1988).

[4] See *New York* v. *Ferber*, 458 U. S. 747 (1982); *Ginsberg* v. *New York*, 390 U. S. 629 (1968).

[5] See *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975); *Miller* v. *California*, 413 U. S., at 18.

[6] See *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41 (1986); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976).

In Indiana the sale of an obscene magazine is a misdemeanor.[7] A person who commits two such misdemeanors, however, engages in a "pattern of racketeering activity" as defined in the State's RICO statute.[8] If by means of that pattern the person acquires, maintains, or otherwise operates an "enterprise,"[9] he or she commits the Indiana felony

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[7] The Indiana obscenity law underlying these cases provides that a "person who knowingly or intentionally

"(1) sends or brings into Indiana obscene matter for sale or distribution; or

"(2) offers to distribute, distributes, or exhibits to another person obscene matter;

"commits a class A misdemeanor." Ind. Code § 35–49–3–1 (1988), enacted by 1983 Ind. Acts 311, § 33, to replace identically worded § 35–30–10.1–2, which had been repealed by 1983 Ind. Acts 311, § 49.

Indiana punishes Class A misdemeanors with fines of up to $5,000 and imprisonment of up to one year. § 35–50–3–2.

[8] Indiana Code § 35–45–6–1, entitled "Racketeer Influenced and Corrupt Organizations," provides in part:

"'Pattern of racketeering activity' means engaging in at least two (2) incidents of racketeering activity that have the same or similar intent, result, accomplice, victim, or method of commission, or that are otherwise interrelated by distinguishing characteristics that are not isolated incidents . . . .

"'Racketeering activity' means to commit, to attempt to commit, or to conspire to commit . . . a violation of IC 35–49–3; murder (IC 35–42–1–1); battery as a Class C felony (IC 35–42–2–1); kidnapping (IC 35–42–3–2); child exploitation (IC 35–42–4–4); robbery (IC 35–42–5–1); arson (IC 35–43–1–1); burglary (IC 35–43–2–1); theft (IC 35–43–4–2); receiving stolen property (IC 35–43–4–2) . . . ."

This enumeration of predicate offenses inexplicably omits a parenthetical description of Ind. Code § 35–49–3. That latter statute is Indiana's current obscenity law, which makes it a misdemeanor to disseminate or distribute matter that is obscene or harmful to minors, or to present a performance that is obscene or harmful to minors.

[9] The term "enterprise" is defined in both the Racketeer Influenced and Corrupt Organizations (RICO) Act and the Civil Remedies for Racketeering Activity (CRRA) Act to include a sole proprietorship and a corporation. See Ind. Code §§ 35–45–6–1, 34–4–30.5–1 (1988). Thus, each of the stores at which obscenity offenses allegedly occurred is an enterprise within the

of "corrupt business influence."[10] Thus does Indiana's RICO Act transform two obscenity misdemeanors into a felony punishable by up to eight years of imprisonment.[11]

Proof of a RICO violation further exposes a defendant to the civil sanctions prescribed in the CRRA Act, including an order dissolving the enterprise, forfeiting its property to the State, and enjoining the defendant from engaging in the same type of business in the future. Ind. Code §§ 34–4–30.5–2 to 34–4–30.5–4 (1988).[12] Thus, even if only a small fraction of

meaning of Indiana RICO. Cf. *Alvers* v. *State*, 489 N. E. 2d 83, 89 (Ind. App. 1986) (corporation is an enterprise within the meaning of State RICO Act).

[10] Indiana Code § 35–45–6–2(a) (1988) provides that a "person

"(1) who has knowingly or intentionally received any proceeds directly or indirectly derived from a pattern of racketeering activity, and who uses or invests those proceeds or the proceeds derived from them to acquire an interest in real property or to establish or to operate an enterprise;

"(2) who through a pattern of racketeering activity, knowingly or intentionally acquires or maintains, either directly or indirectly, an interest in or control of real property or an enterprise; or

"(3) who is employed by or associated with an enterprise, and who knowingly or intentionally conducts or otherwise participates in the activities of that enterprise through a pattern of racketeering activity;

"commits corrupt business influence, a Class C felony."

[11] Under Indiana law, a person convicted of a Class C felony such as this is subject to a $10,000 fine and to a term of five years, which may be increased to eight or reduced to two years. Ind. Code § 35–50–2–6 (1988).

[12] Eschewing criminal proceedings, the prosecutor in No. 87–470 brought a civil action alleging a RICO violation and seeking the gamut of relief available under the CRRA Act. App. 7–49. The trial court found probable cause to believe that the Indiana RICO statute had been violated and the bookstore padlocked and its inventory, furnishings, and other contents seized. Petitioner in No. 87–470 appealed on a number of constitutional grounds. Consolidating petitioner's case with one originating in Indianapolis, the Indiana Court of Appeals held that the relevant RICO/CRRA provisions violate the First and Fourteenth Amendments to the Constitution. *4447 Corp.* v. *Goldsmith*, 479 N. E. 2d 578 (1985).

A few months after this opinion issued, a trial judge granted the motion of petitioners in No. 87–614 to dismiss the two RICO charges against them

the activities of the enterprise is unlawful, the State may close the entire business, seize its inventory, and bar its owner from engaging in his or her chosen line of work.

In its decision upholding the constitutionality of the Indiana RICO/CRRA scheme, the Indiana Supreme Court expressly approved the civil remedies as well as the criminal sanctions, and unequivocally rejected the suggestion that the nature of a business or of its assets should affect a court's remedial powers. *4447 Corp.* v. *Goldsmith*, 504 N. E. 2d 559 (1987). It categorically stated that if the elements of a pattern of racketeering activity have been proved, all of a bookstore's expressive materials, obscene or not, are subject to forfeiture.[13]

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on the ground that Indiana's RICO statute is unconstitutionally vague. The Indiana Supreme Court subsequently reversed the Indiana Court of Appeals in No. 87–470, sustaining the RICO/CRRA statutes and the actual pretrial seizures. *4447 Corp.* v. *Goldsmith*, 504 N. E. 2d 559 (1987). The Indiana Appellate Court then reversed the dismissal of the RICO counts against petitioners in No. 87–614. *State* v. *Sappenfield*, 505 N. E. 2d 504 (1987).

[13] The Indiana Supreme Court explained:

"We believe the overall purpose of the RICO statute is as applicable to obscenity violations as it is to the other enumerated predicate offenses which have no conceivable First Amendment ramifications. Thus we cannot agree with either appellants or the Court of Appeals that the purpose of the Indiana RICO/CRRA scheme, as it pertains to the predicate offense of obscenity, is to restrain the sale or distribution of expressive materials. It is irrelevant whether assets acquired through racketeering activity are obscene or not. They are subject to forfeiture if the elements of a pattern of racketeering activity are shown. The other CRRA remedies, such as license revocation, are also available regardless of the nature of the racketeering enterprise." 504 N. E. 2d, at 564.

"[T]he purpose of the forfeiture provisions is totally unrelated to the nature of the assets in question. The overall purpose of the anti-racketeering laws is unequivocal, even where the predicate offense alleged is a violation of the obscenity statute. The remedy of forfeiture is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity. Stated simply,

II

This Court finds no merit in the claim that Indiana's RICO law is unconstitutionally vague as applied to obscenity predicate offenses. Since Indiana's obscenity law satisfies the strictures set out in *Miller* v. *California*, 413 U. S. 15 (1973), the Court reasons, the predicate offense is not too vague; necessarily, a "pattern" of such offenses is even less vague. See *ante*, at 57–58, and n. 7. This is a non sequitur. Reference to a "pattern" of at least two violations only compounds the intractable vagueness of the obscenity concept itself.[14] The Court's contrary view rests on a construction of the RICO statute that requires nothing more than proof that a defendant sold or exhibited to a willing reader two obscene magazines—or perhaps just two copies of one such magazine. I would find the statute unconstitutional even without the special threat to First Amendment interests posed by the CRRA remedies.[15] Instead of reiterating what I have al-

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it is irrelevant whether assets derived from an alleged violation of the RICO statute are or are not obscene." *Id.*, at 565.

"In sum, these actions seeking various CRRA remedies were instituted in an attempt to compel the forfeiture of the proceeds of alleged racketeering activity and not to restrain the future distribution of expressive materials. We hold that the RICO/CRRA statutes as they pertain to the predicate offense of obscenity do not violate the First and Fourteenth Amendments of the United States Constitution." *Id.*, at 565–566.

[14] See, *e. g.*, *Marks* v. *United States*, 430 U. S. 188, 198 (1977) (STEVENS, J., concurring in part and dissenting in part); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 85 (1973) (BRENNAN, J., joined by Stewart and MARSHALL, JJ., dissenting).

Ironically, the legal test for determining the existence of a pattern of racketeering activity has been likened to "Justice Stewart's famous test for obscenity—'I know it when I see it'—set forth in his concurrence in *Jacobellis* v. *Ohio*, 378 U. S. 184, 197 [(1964)]." *Morgan* v. *Bank of Waukegan*, 804 F. 2d 970, 977 (CA7 1986) (citing *Papai* v. *Cremosnik*, 635 F. Supp. 1402, 1410 (ND Ill. 1986)).

[15] It long has been "my conviction that government may not constitutionally criminalize mere possession or sale of obscene literature, absent some connection to minors or obtrusive display to unconsenting adults." *Pope* v. *Illinois*, 481 U. S. 497, 513 (1987) (STEVENS, J., dissenting). See

ready written, however, I shall limit this opinion to a discussion of the significance of the civil remedies.

I disagree with the Court's view that questions relating to the severity of the civil sanctions that may follow a RICO conviction are not ripe for review. See *ante*, at 60. For the Indiana Supreme Court's opinion in *4447 Corp.* v. *Goldsmith*, *supra*, makes it perfectly clear that the RICO and CRRA Acts, enacted at the same time and targeting precisely the same subject matter, are parts of a single statutory scheme. It is also obvious that the principal purpose of proving a pattern of racketeering activity is to enable the prosecutor to supplement criminal penalties with unusually severe civil sanctions. The Indiana court's descriptions of the "overall purpose of the anti-racketeering laws"[16] and specifically of "the purpose of the Indiana RICO/CRRA scheme as it pertains to the predicate offense of obscenity"[17] confirm what is in any event an obvious reading of this legislation. The significance of making obscenity a predicate offense comparable to murder, kidnaping, extortion, or arson cannot be evaluated fairly if the CRRA portion of the RICO/CRRA scheme is ignored.

III

Recurrent in the history of obscenity regulation is an abiding concern about media that have a "tendency to deprave or corrupt" those who view them, "to stir sexual impulses and lead to sexually impure thoughts," or to "appeal . . . to prurient interest." See *Alberts* v. *California* (decided with *Roth* v. *United States*), 354 U. S. 476, 498–499 (1957) (Harlan, J.,

Smith v. *United States*, 431 U. S. 291, 311, 315–316 (1977) (STEVENS, J., dissenting). See also *Ward* v. *Illinois*, 431 U. S. 767, 777–782 (1977) (STEVENS, J., dissenting); *Splawn* v. *California*, 431 U. S., at 602 (STEVENS, J., dissenting); *Marks* v. *United States*, 430 U. S., at 198 (STEVENS, J., concurring in part and dissenting in part). Cf. *Pinkus* v. *United States*, 436 U. S., at 305 (STEVENS, J., concurring) (in the absence of Court's precedents, would not sustain federal obscenity law).

[16] 504 N. E. 2d, at 565.

[17] *Id.*, at 564.

concurring in result). Antecedents of the statutory scheme under review in these cases plainly reflect this concern. Early Indiana statutes classified as crimes "Against Public Morals" or "Against Chastity and Morality" the distribution not only of "obscene" materials, but also of materials that were "lewd," "indecent," or "lascivious" or that described or depicted "criminals, desperadoes, or . . . men or women in lewd and unbecoming positions or improper dress." Ind. Rev. Stat. §§ 2107–2109 (1897); Ind. Code Ann. §§ 2359–2361 (Burns 1914). Prohibited in the same category were profane cursing, advertising drugs for female use, Sunday baseball, and letting stallions in public. Ind. Rev. Stat. §§ 2110, 2111, 2113, 2117 (1897); Ind. Code Ann. §§ 2362–2364, 2369, 2373 (Burns 1914). Indiana's regulation of morals offenses paralleled efforts elsewhere in the United States and in Great Britain. 1 Report, at 240–245. Cf. *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 104–105 (1973) (BRENNAN, J., dissenting) (outlining obscenity laws' history). Quite simply, the longstanding justification for suppressing obscene materials has been to prevent people from having immoral thoughts.[18] The failure to do so, it is argued, threatens the moral fabric of our society.[19]

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[18] As Professor Henkin explained, American obscenity laws are "rooted in this country's religious antecedents, of governmental responsibility for communal and individual 'decency' and 'morality.'" Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Colum. L. Rev. 391 (1963). He continued:

"Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the 'consumer.' Obscenity, at bottom, is not crime. Obscenity is sin." *Id.*, at 395.

[19] In proposing the addition of state and federal obscenity violations as predicate offenses under Federal RICO, 18 U. S. C. § 1961 *et seq.*, Senator Helms stated:

Limiting society's expression of that concern is the Federal Constitution. The First Amendment presumptively protects communicative materials. See *Roaden* v. *Kentucky*, 413 U. S. 496, 504 (1973). Because the line between protected pornographic speech and obscenity is "dim and uncertain," *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963), "a State is not free to adopt whatever procedures it pleases for dealing with obscenity," *Marcus* v. *Search Warrant*, 367 U. S. 717, 731 (1961), but must employ careful procedural safeguards to assure that only those materials adjudged obscene are withdrawn from public commerce. *Freedman* v. *Maryland*, 380 U. S. 51 (1965); see *Miller* v. *California*, 413 U. S., at 23–24.[20] The Constitution confers a

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"[W]e are experiencing an explosion in the volume and availability of pornography in our society. Today it is almost impossible to open mail, turn on the television, or walk in the downtown areas of our cities, or even in some suburban areas, without being accosted by pornographic materials. The sheer volume and pervasiveness of pornography in our society tends to make adults less sensitive to the traditional value of chaste conduct and leads children to abandon the moral values their parents have tried so hard to instill in them.

. . . . . .

". . . Surely it is not just coincidential *[sic]* that, as *[sic]* a time in our history when pornography and obscene materials are rampant, we are also experiencing record levels of promiscuity, veneral *[sic]* disease, herpes, acquired immune deficiency syndrome (AIDS), abortion, divorce, family breakdown, and related problems. At a minimum, pornography lowers the general moral tone of society and contributes to social problems that were minimal or nonexistent in earlier periods of our history." 130 Cong. Rec. 844 (1984). The amendment was enacted in the Act of Oct. 12, 1984, Pub. L. 98–473, 98 Stat. 2143, codified at 18 U. S. C. § 1961(1) (1982 ed., Supp. IV).

[20] "To the extent, therefore, that regulation of pornography constitutes an abridgment of the freedom of speech, or an abridgment of the freedom of the press, it is at least presumptively unconstitutional. And even if some or all forms of regulation of pornography are seen ultimately not to constitute abridgments of the freedom of speech or the freedom of the press, the fact remains that the Constitution treats speaking and printing as special, and thus the regulation of anything spoken or printed must be

right to possess even materials that are legally obscene. *Stanley* v. *Georgia*, 394 U. S. 557 (1969). Moreover, public interest in access to sexually explicit materials remains strong despite continuing efforts to stifle distribution.[21]

Whatever harm society incurs from the sale of a few obscene magazines to consenting adults is indistinguishable from the harm caused by the distribution of a great volume of pornographic material that is protected by the First Amendment.[22] Elimination of a few obscene volumes or videotapes

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examined with extraordinary care. For even when some forms of regulation of what is spoken or printed are not abridgments of the freedom of speech, or abridgments of the freedom of the press, such regulations are closer to constituting abridgments than other forms of governmental action. If nothing else, the barriers between permissible restrictions on what is said or printed and unconstitutional abridgments must be scrupulously guarded." 1 Report, at 249–250.

[21] The videotape dealers' association, for example, reports that in the "three-quarters of the nation's video stores carry[ing] adult titles," that material, often to be viewed by private individuals on their own video cassette recorders, "accounts for about 13% of their business, valued at $250 million annually." Groskaufmanis, What Films We May Watch: Videotape Distribution and the First Amendment, 136 U. Pa. L. Rev. 1263, 1273, n. 75 (1988).

The Attorney General's Commission on Pornography quotes Geoffrey R. Stone, now dean of the University of Chicago Law School, as follows: "'[T]he very fact . . . that there is a vast market in our society for sexually explicit expression suggests that for many people, this type of speech serves what they believe to be, it may be amusement, it m[a]y be containment, it may be sexual stimulation, it may be fantasy, whatever it is, many of us believe that this expression is to our own lives, in some way, valuable. That value should not be overlooked.'" 2 Report, at 1269. See also *Marks* v. *United States*, 430 U. S., at 198 (STEVENS J., concurring in part and dissenting in part) ("However distasteful these materials are to some of us, they are nevertheless a form of communication and entertainment acceptable to a substantial segment of society; otherwise, they would have no value in the marketplace").

[22] The Attorney General's Commission on Pornography highlighted this fact as follows:

"A central part of our mission has been to examine the question whether pornography is harmful. In attempting to answer this question, we have

from an adult bookstore's shelves thus scarcely serves the State's purpose of controlling public morality. But the State's RICO/CRRA scheme, like the Federal RICO law, 18 U. S. C. § 1961 *et seq.*, after which it was patterned, 504 N. E. 2d, at 560, furnishes prosecutors with "drastic methods" for curtailing undesired activity.[23] The Indiana RICO/CRRA statutes allow prosecutors to cast wide nets[24] and seize, upon a showing that two obscene materials have been sold, or even just exhibited, all of a store's books, magazines, films, and videotapes—the obscene, those nonobscene yet sexually explicit, and even those devoid of sexual reference.[25]

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made a conscious decision not to allow our examination of the harm question to be constricted by the existing legal/constitutional definition of the legally obscene." 1 Report, at 299.

"As a result, our inquiry into harm encompasses much material that may not be legally obscene, and also encompasses much material that would not generally be considered 'pornographic' as we use that term here." *Id.*, at 302.

"To a number of us, the most important harms must be seen in moral terms, and the act of moral condemnation of that which is immoral is not merely important but essential. From this perspective there are acts that need be seen not only as causes of immorality but as manifestations of it. Issues of human dignity and human decency, no less real for their lack of scientific measurability, are for many of us central to thinking about the question of harm. And when we think about harm in this way, there are acts that must be condemned not because the evils of the world will thereby be eliminated, but because conscience demands it." *Id.*, at 303.

[23] "Drastic methods to combat [organized crime] are essential, and we must develop law enforcement measures at least as efficient as those of organized crime." 116 Cong. Rec. 35199 (1970) (remarks of Rep. Rodino). See also *Russello* v. *United States*, 464 U. S. 16, 26–29 (1983); *United States* v. *Turkette*, 452 U. S. 576, 586–593 (1981).

[24] Cf. *United States* v. *Elliott*, 571 F. 2d 880, 903 (CA5) ("[T]he [Federal] RICO net is woven tightly to trap even the smallest fish"), cert. denied, 439 U. S. 953 (1978).

[25] The Court of Appeals of Indiana made this observation, 479 N. E. 2d, at 601:

"[T]he state concedes that the obscenity of the seized inventories of books, magazines, and films is irrelevant and need not even be alleged. This ar-

Reported decisions indicate that the enforcement of Indiana's RICO/CRRA statutes has been primarily directed at adult bookstores.[26] Patently, successful prosecutions would ad-

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gument reflects an accurate reading of the statutes but also reveals the deeply-flawed nature of the regulatory scheme as a response to obscenity. May *avant-garde* booksellers and theaters be padlocked and forfeited to the state upon a showing that alongside literary, political, and cinematic classics, they have twice disseminated controversial works subsequently adjudged to be obscene? . . . [T]he guarantees of the First Amendment mean nothing if the state may arrogate such discretion over the continued existence of bookstores and theaters."

The State Supreme Court did not deny that the RICO/CRRA Acts permitted that result, but rather professed faith that prosecutors would not abuse the power given them under the statutes. 504 N. E. 2d, at 565, rev'g 479 N. E. 2d 578 (Ind. App. 1985).

Even the suppression only of sex-oriented materials on the borderline between protected and unprotected speech might remove a vast number of materials from circulation. See Dietz & Sears, Pornography and Obscenity Sold in "Adult Bookstores": A Survey of 5132 Books, Magazines, and Films in Four American Cities, 21 U. Mich. J. L. Ref. 7, 42 (1987-1988) (36% of materials in adult bookstores surveyed would be obscene "in the eyes of a juror with sexually liberal attitudes and values," while 100% would be obscene "in the eyes of those with sexually traditional attitudes and values").

[26] In five of the eight reported opinions reviewing prosecutions pursuant to Indiana's RICO/CRRA statutes, the predicate offenses are obscenity violations. *Sappenfield* v. *Indiana*, 574 F. Supp. 1034 (ND Ind. 1983) (dismissing for lack of standing suit by petitioner in No. 87–614 seeking to prevent prosecutor in LaPorte County from adding civil sanctions to criminal RICO prosecution already under way there); *4447 Corp.* v. *Goldsmith*, 504 N. E. 2d 559 (Ind. 1987) (case below), rev'g 479 N. E. 2d 578 (Ind. App. 1985) (Allen and Marion Counties); *Studio Art Theatre of Evansville, Inc.* v. *State*, 530 N. E. 2d 750 (Ind. App. 1988) (upholding RICO convictions in Vanderburgh County, based on alleged sale of movies harmful to minors); *State* v. *Sappenfield*, 505 N. E. 2d 504 (Ind. App. 1987) (Howard County). See also *J. N. S., Inc.* v. *Indiana*, 712 F. 2d 303 (CA7 1983) (dismissing for lack of standing Indianapolis distributors' suit challenging constitutionality of CRRA).

The first Federal RICO prosecution based on obscenity violations occurred in *United States* v. *Pryba*, Crim. No. 87–00208-A (ED Va., Nov. 10, 1987). After the District Court had rejected constitutional challenges

vance significantly the State's efforts to silence immoral speech and repress immoral thoughts.

In my opinion it is fair to identify the effect of Indiana's RICO/CRRA Acts as the specific purpose of the legislation.[27] The most realistic interpretation of the Indiana Legislature's intent in making obscenity a RICO predicate offense is to expand beyond traditional prosecution of legally obscene materials into restriction of materials that, though constitutionally protected, have the same undesired effect on the community's morals as those that are actually obscene.[28]

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to the inclusion of obscenity offenses in the Federal RICO statute, 674 F. Supp. 1504 (ED Va. 1987), a jury found defendants "'guilty of interstate distribution of $105.30 worth of obscene material and decided that Dennis Pryba's three Washington, D. C., area hardcore bookstores and eight videotape clubs [valued at $1 million] were forfeitable under the terms of the RICO statute.'" Eggenberger, RICO vs. Dealers in Obscene Matter: The First Amendment Battle, 22 Colum. J. L. & Soc. Probs. 71 (1988) (quoting Hayes, A Jury Wrestles with Pornography, American Lawyer 96, 97 (Mar. 1988)).

[27] "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation." *Washington* v. *Davis*, 426 U. S. 229, 253 (1976) (STEVENS, J., concurring). See also *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 708 (1931) ("[I]n passing upon constitutional questions . . . , the statute must be tested by its operation and effect").

[28] Indiana is far from the only governmental entity to have moved against undesirable, sexually explicit materials in this manner. Of 26 States besides Indiana that have passed laws patterned after the Federal RICO statute, 14 include violations of obscenity laws as predicate offenses upon which a RICO-type prosecution may be based. Ariz. Rev. Stat. Ann. § 13–2301(D)(4)(u) (Supp. 1988–1989); Colo. Rev. Stat. § 18–17–103(5)(b)(VI) (1986); Del. Code Ann., Tit. 11, §§ 1502(9)(a), (9)(b)(7) (1987); Fla. Stat. § 895.02(1)(a)(27) (1987); Ga. Code Ann. § 16–14–3(3)(A)(xii) (1988); Idaho Code § 18–7803(8) (Supp. 1988); N. J. Stat. Ann. § 2C:41–1(e) (West Supp. 1988–1989); N. C. Gen. Stat. § 75D–3(c)(2) (1987); N. D. Cent. Code § 12.1–06.1–01(2)(e)(17) (Supp. 1987); Ohio Rev. Code

Fulfillment of that intent surely would overflow the boundaries imposed by the Constitution.

The Court properly holds today that when the predicate offenses are obscenity violations, the State may not undertake the pretrial seizures of expressive materials that Indiana's RICO/CRRA legislation authorizes. See *ante*, at 66–67. Yet it does so only after excluding from its holding pretrial seizures of "nonexpressive property," *ante*, at 67, n. 12, and "assum[ing] without deciding that bookstores and their contents are forfeitable" and otherwise subject to CRRA's posttrial civil sanctions. *Ante*, at 65, and n. 11. I would extend the Court's holding to prohibit the seizure of these stores' inventories, even after trial, based on nothing more than a "pattern" of obscenity misdemeanors.

For there is a difference of constitutional dimension between an enterprise that is engaged in the business of selling and exhibiting books, magazines, and videotapes and one that is engaged in another commercial activity, lawful or unlawful. A bookstore receiving revenue from sales of obscene books is not the same as a hardware store or pizza parlor funded by loan-sharking proceeds. The presumptive First Amendment

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Ann. §§ 2923.31(I)(1), (I)(2) (1987); Okla. Stat., Tit. 22, § 1402(10)(v) (Supp. 1988); Ore. Rev. Stat. §§ 166.715(6)(a)(T), (6)(b) (1987); Utah Code Ann. § 76–10–1602(4)(fff)-(iii), (zzz) (Supp. 1988); Wash. Rev. Code § 9A.82.010 (14)(s) (Supp. 1988).

The trend toward using RICO statutes to enforce obscenity laws comports with the urgings of the Attorney General's Commission on Pornography. 1 Report, at 435 (Recommendation "10. STATE LEGISLATURES SHOULD ENACT A RACKETEER INFLUENCED CORRUPT ORGANIZATIONS (RICO) STATUTE WHICH HAS OBSCENITY AS A PREDICATE ACT"); *id.*, at 437 (Recommendation "15. THE DEPARTMENT OF JUSTICE AND UNITED STATES ATTORNEYS SHOULD USE THE RACKETEER INFLUENCED CORRUPT ORGANIZATION ACT (RICO) AS A MEANS OF PROSECUTING MAJOR PRODUCERS AND DISTRIBUTORS OF OBSCENE MATERIAL"); *id.*, at 464, 498, 515. Cf. *id.*, at 433, 465, 472, 497 (recommending that Federal and State Governments enact statutes authorizing forfeitures even if two predicate offenses cannot be proved, barring a RICO prosecution).

protection accorded the former does not apply either to the predicate offense or to the business use in the latter. Seldom will First Amendment protections have any relevance to the sanctions that might be invoked against an ordinary commercial establishment. Nor will use of RICO/CRRA sanctions to rid that type of enterprise of illegal influence, even by closing it, engender suspicion of censorial motive. Prosecutors in such cases desire only to purge the organized-crime taint; they have no interest in deterring the sale of pizzas or hardware. Sexually explicit books and movies, however, are commodities the State does want to exterminate. The RICO/CRRA scheme promotes such extermination through elimination of the very establishments where sexually explicit speech is disseminated.

Perhaps all, or virtually all, of the protected films and publications that petitioners offer for sale are so objectionable that their sales should only be permitted in secluded areas. Cf. *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50 (1976). Many sexually explicit materials are little more than noxious appendages to a sprawling media industry. It is nevertheless true that a host of citizens desires them, that at best remote and indirect injury to third parties flows from them, and that purchasers have a constitutional right to possess them. The First Amendment thus requires the use of "sensitive tools" to regulate them. *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). Indiana's RICO/CRRA statutes arm prosecutors not with scalpels to excise obscene portions of an adult bookstore's inventory but with sickles to mow down the entire undesired use. This the First Amendment will not tolerate. "'[I]t is better to leave a few . . . noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits,'"[29] for the "right to receive information and ideas,

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[29] *Near* v. *Minnesota ex rel. Olson*, 283 U. S., at 718 (Hughes, C. J.) (quoting 4 Writings of James Madison 544 (1865)).

regardless of their social worth, is fundamental to our free society."[30]

Accordingly, I would reverse the decision in No. 87–614. In No. 87–470, I would not only invalidate the pretrial seizures but would also direct that the complaint be dismissed.

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[30] *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969) (citation omitted).

BLANCHARD *v.* BERGERON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-1485. Argued November 28, 1988—Decided February 21, 1989

After a jury awarded petitioner $10,000 in damages on his claim that respondent sheriff's deputy had beaten him and thereby deprived him of his civil rights under 42 U. S. C. § 1983, the Federal District Court awarded him $7,500 in attorney's fees under 42 U. S. C. § 1988, which provides that the court, "in its discretion, may allow . . . a reasonable attorney's fee" to a prevailing party in certain federal civil rights actions, including those under § 1983. The Court of Appeals reduced the fee award to $4,000, ruling that petitioner's 40% contingent-fee arrangement with his lawyer served as a cap on the amount of fees that could be awarded. The court also found that hours billed for the time of law clerks and paralegals were not compensable since they would be included within the contingency fee.

Held:

1. An attorney's fee allowed under § 1988 is not limited to the amount provided in the plaintiff's contingent-fee arrangement with his counsel. To hold otherwise would be inconsistent with the statute, which broadly requires all defendants to pay a reasonable fee to all prevailing plaintiffs if ordered to do so by the court acting in its sound judgment and in light of all the circumstances of the case. This Court's decisions have required that the initial estimate of a reasonable court-awarded fee be calculated by multiplying prevailing billing rates by the hours reasonably expended on successful claims, which "lodestar" figure may then be adjusted by other factors. The Court has never suggested that any one such factor should substitute for the lodestar approach. In fact, the lodestar figure is entitled to a strong presumption of reasonableness and prevents a "windfall" for attorneys in § 1983 actions by guaranteeing that they receive only the reasonable worth of the services rendered. Thus, as § 1988's legislative history confirms, a private fee arrangement is but one of the many factors to be considered and cannot, standing alone, impose an automatic limitation on the exercise of the trial judge's discretion, which is central to the operation of the statute. Moreover, such a limitation might place an undesirable emphasis on the importance of the recovery of damages, whereas § 1988 makes no distinction between damages actions and equitable suits but was intended to encourage meritorious claims, irrespective of their nature, because of the benefits of

civil rights litigation for the named plaintiff and for society at large. Fee awards in § 1983 damages cases should not be modeled upon the contingent-fee arrangements used in personal injury litigation, which benefits only the individual plaintiff. Pp. 91–96.

2. Since the Court of Appeals erred in ruling that the fee award was controlled by the contingency arrangement, it must consider the determination of the total fee award on remand. P. 97.

831 F. 2d 563, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 97.

William W. Rosen argued the cause for petitioner. With him on the brief was *Charles J. Pisano*.

Edmond L. Guidry III argued the cause and filed a brief for respondent.*

JUSTICE WHITE delivered the opinion of the Court.

The issue before us is whether an attorney's fee allowed under 42 U. S. C. § 1988 is limited to the amount provided in a contingent-fee arrangement entered into by a plaintiff and his counsel.

I

Petitioner Arthur J. Blanchard brought suit in the United States District Court for the Western District of Louisiana alleging violations of his civil rights under 42 U. S. C. § 1983. Blanchard asserted that he was beaten by Sheriff's Deputy James Bergeron while he was in Oudrey's Odyssey Lounge. Blanchard brought his claim against the deputy, the sheriff, and the St. Martin Parish Sheriff's Department. He also joined with his civil rights claim a state-law negligence claim against the above defendants and against the owners and a

*Briefs of *amici curiae* urging reversal were filed for the Advocacy Center for the Elderly and Disabled by *M. David Gelfand;* for Farnsworth, Saperstein & Seligman et al. by *Guy T. Saperstein, Antonia Hernandez,* and *E. Richard Larson;* and for the National Association of Legal Assistants, Inc., by *John A. DeVault III.*

manager of the lounge and the lounge itself. The case was tried and a jury awarded Blanchard compensatory damages in the amount of $5,000 and punitive damages in the amount of $5,000 on his § 1983 claim. Under the provisions of 42 U. S. C. § 1988, which permit the award of attorney's fees to a prevailing party in certain federal civil rights actions,[1] Blanchard sought attorney's fees and costs totaling more than $40,000. The District Court, after reviewing the billing and cost records furnished by counsel, awarded $7,500 in attorney's fees and $886.92 for costs and expenses.[2]

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[1] The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94–559, 90 Stat. 2641, as set forth in 42 U. S. C. § 1988 states:

". . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The section states that the court "in its discretion" may allow a fee, but that discretion is not without limit: the prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 (1968); *Hensley* v. *Eckerhart*, 461 U. S. 424, 429 (1983).

[2] The District Court referred to the guidelines announced by this Court in *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983), for determining the calculation of fee awards. In that case, we said that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.*, at 433. We also went on to say that "[t]he district court . . . should exclude from this initial fee calculation hours that were not 'reasonably expended'" on the litigation. *Id.*, at 434, quoting S. Rep. No. 94–1011, p. 6 (1976). The District Court here first determined that the plaintiff, Blanchard, was a prevailing party. Then, to arrive at a reasonable fee, the court multiplied what it deemed to be the reasonable hours expended on the litigation by a reasonable hourly rate. This lodestar figure was then further reduced by the District Court based on its considerations of "the elemental nature of this litigation and the contingency fee arrangement entered." App. to Pet. for Cert. 14A (ruling in Civil Action No. 83–0755, filed Oct. 23, 1986; Record 363, 370). Accordingly, the District Court adjusted its lodestar of $9,720 downward to the awarded fee of $7,500. We express no opinion on the number of hours reasonably ex-

Petitioner appealed this award to the Court of Appeals for the Fifth Circuit, seeking to increase the award. The Court of Appeals, however, reduced the award because petitioner had entered into a contingent-fee arrangement with his lawyer,[3] under which the attorney was to receive 40% of any damages awarded should petitioner prevail in his suit. While recognizing that other Circuits had different views, the court held that it was bound by its prior decision in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 718 (1974), to rule that the contingency-fee agreement "serves as a cap on the amount of attorney's fee to be awarded." 831 F. 2d 563, 564 (1987). The court further found that hours billed for the time of law clerks and paralegals were not compensable since they would be included within the contingency fee. *Ibid.* Accordingly, the court limited the fee award to 40% of the $10,000 damages award—$4,000.

Because other Courts of Appeals have concluded that a § 1988 fee award should not be limited by a contingent-fee agreement between the attorney and his client,[4] we granted certiorari to resolve the conflict, 487 U. S. 1217 (1988). We now reverse.

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pended on this litigation or on the reasonable hourly rate for the work involved here or even whether the District Court correctly characterized the nature of the litigation as "elemental."

[3] Blanchard's attorney when he filed his original complaint on March 29, 1983, was Charles Pisano. On June 11, 1984, the District Court granted a motion substituting William Rosen as counsel.

[4] *Cooper* v. *Singer*, 719 F. 2d 1496, 1507 (CA10 1983); *Lusby* v. *T. G. & Y. Stores, Inc.*, 749 F. 2d 1423 (CA10 1984), cert. denied, 474 U. S. 818 (1985); *Sisco* v. *J. S. Alberici Constr. Co.*, 733 F. 2d 55, 56 (CA8 1984); *Sanchez* v. *Schwartz*, 688 F. 2d 503, 505 (CA7 1982). The Fifth Circuit is not alone, however, in holding that a contractual agreement between a § 1983 plaintiff and counsel should govern the award of attorney's fees under § 1988. See *Pharr* v. *Housing Authority of Prichard*, 704 F. 2d 1216 (CA11 1983).

II

Section 1988 provides that the court, "in its discretion, may allow . . . a reasonable attorney's fee . . . ." The section does not provide a specific definition of "reasonable" fee, and the question is whether the award must be limited to the amount provided in a contingent-fee agreement. The legislative history of the Act is instructive insofar as it tells us: "In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" S. Rep. No. 94–1011, p. 6 (1976) (citing *Davis* v. *County of Los Angeles*, 8 EPD ¶9444 (CD Cal. 1974); and *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680, 684 (ND Cal. 1974)).

In many past cases considering the award of attorney's fees under § 1988, we have turned our attention to *Johnson* v. *Georgia Highway Express, Inc.*, *supra*, a case decided before the enactment of the Civil Rights Attorney's Fee Award Act of 1976. As we stated in *Hensley* v. *Eckerhart*, 461 U. S. 424, 429–431 (1983), *Johnson* provides guidance to Congress' intent because both the House and Senate Reports refer to the 12 factors set forth in *Johnson* for assessing the reasonableness of an attorney's fee award.[5] The Senate Re-

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[5]The 12 factors set forth by the *Johnson* court for determining fee awards under § 706(k) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(k) are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F. 2d, at 717–719.

port, in particular, refers to three District Court decisions that "correctly applied" the 12 factors laid out in *Johnson*.[6]

In the course of its discussion of the factors to be considered by a court in awarding attorney's fees, the *Johnson* court dealt with fee arrangements:

> "'Whether or not [a litigant] agreed to pay a fee and in what amount is not decisive. Conceivably, a litigant might agree to pay his counsel a fixed dollar fee. This might be even more than the fee eventually allowed by the court. Or he might agree to pay his lawyer a percentage contingent fee that would be greater than the fee the court might ultimately set. Such arrangements should not determine the court's decision. The criterion for the court is not what the parties agree but what is reasonable.'" 488 F. 2d, at 718 (quoting *Clark* v. *American Marine Corp.*, 320 F. Supp. 709, 711 (ED La. 1970), aff'd 437 F. 2d 959 (CA5 1971)).

Yet in the next sentence, *Johnson* says "In no event, however, should the litigant be awarded a fee greater than he is contractually bound to pay, if indeed the attorneys have contracted as to amount." 488 F. 2d, at 718. This latter statement, never disowned in the Circuit, was the basis for the decision below. But we doubt that Congress embraced this aspect of *Johnson*, for it pointed to the three District Court cases in which the factors are "correctly applied." Those cases clarify that the fee arrangement is but a single factor and not determinative. In *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680 (ND Cal. 1974), aff'd, 550 F. 2d 464 (CA9 1977), rev'd on other grounds, 436 U. S. 547 (1978), for example,

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[6] "The appropriate standards, see *Johnson* v. *Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680 (N. D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E. P. D. ¶ 9444 (C. D. Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F. R. D. 483 (W. D. N. C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." S. Rep. No. 94-1011, p. 6 (1976).

the District Court considered a contingent-fee arrangement to be a factor, but not dispositive, in the calculation of a fee award. In *Davis* v. *County of Los Angeles*, *supra*, the court permitted a fee award to counsel in a public interest firm which otherwise would have been entitled to no fee. Finally, in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F. R. D. 483 (WDNC 1975), the court stated that reasonable fees should be granted regardless of the individual plaintiff's fee obligations. *Johnson*'s "list of 12" thus provides a useful catalog of the many factors to be considered in assessing the reasonableness of an award of attorney's fees; but the one factor at issue here, the attorney's private fee arrangement, standing alone, is not dispositive.

The *Johnson* contingency-fee factor is simply that, a factor. The presence of a pre-existing fee agreement may aid in determining reasonableness. "'The fee quoted to the client or the percentage of the recovery agreed to is helpful in demonstrating the attorney's fee expectations when he accepted the case.'" *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U. S. 711, 723 (1987) quoting *Johnson*, 488 F. 2d, at 718. But as we see it, a contingent-fee contract does not impose an automatic ceiling on an award of attorney's fees, and to hold otherwise would be inconsistent with the statute and its policy and purpose.

As we understand § 1988's provision for allowing a "reasonable attorney's fee," it contemplates reasonable compensation, in light of all of the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less. Should a fee agreement provide less than a reasonable fee calculated in this manner, the defendant should nevertheless be required to pay the higher amount. The defendant is not, however, required to pay the amount called for in a contingent-fee contract if it is more than a reasonable fee calculated in the usual way. It is true that the purpose of § 1988 was to make sure that competent counsel was available to civil rights plaintiffs, and it is of course arguable that if a plaintiff is able to secure an attorney

on the basis of a contingent or other fee agreement, the purpose of the statute is served if the plaintiff is bound by his contract. On that basis, however, the plaintiff should recover nothing from the defendant, which would be plainly contrary to the statute. And Congress implemented its purpose by broadly requiring all defendants to pay a reasonable fee to all prevailing plaintiffs, if ordered to do so by the court. Thus it is that a plaintiff's recovery will not be reduced by what he must pay his counsel. Plaintiffs who can afford to hire their own lawyers, as well as impecunious litigants, may take advantage of this provision. And where there are lawyers or organizations that will take a plaintiff's case without compensation, that fact does not bar the award of a reasonable fee. All of this is consistent with and reflects our decisions in cases involving court-awarded attorney's fees.

Hensley v. *Eckerhart*, 461 U. S. 424 (1983), directed lower courts to make an initial estimate of reasonable attorney's fees by applying prevailing billing rates to the hours reasonably expended on successful claims. And we have said repeatedly that "[t]he initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum* v. *Stenson*, 465 U. S. 886, 888 (1984). The courts may then adjust this lodestar calculation by other factors. We have never suggested that a different approach is to be followed in cases where the prevailing party and his (or her) attorney have executed a contingent-fee agreement. To the contrary, in *Hensley* and in subsequent cases, we have adopted the lodestar approach as the centerpiece of attorney's fee awards. The *Johnson* factors may be relevant in adjusting the lodestar amount, but no one factor is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation. In *Blum*, we rejected, as contrary to congressional intent, the notion that fees are to be calculated on a cost-based standard. Further, as we said in *Blum*, "Congress did not

intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization." 465 U. S., at 894. That a nonprofit legal services organization may contractually have agreed not to charge *any* fee of a civil rights plaintiff does not preclude the award of a reasonable fee to a prevailing party in a § 1983 action, calculated in the usual way.

It is clear that Congress "intended that the amount of fees awarded . . . be governed by the same standards which prevail in other types of equally complex Federal litigation . . . and not be reduced because the rights involved may be nonpecuniary in nature." S. Rep. No. 94–1011, at 6. "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley*, *supra*, at 429, quoting H. R. Rep. No. 94–1558, p. 1 (1976). Even when considering the award of attorney's fees under the Clean Air Act, 42 U. S. C. § 7401, the Court has applied the § 1988 approach, stating: "A strong presumption that the lodestar figure—the product of reasonable hours times a reasonable rate—represents a 'reasonable fee' is wholly consistent with the rationale behind the usual fee-shifting statute . . . ." *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546, 565 (1986).

If a contingent-fee agreement were to govern as a strict limitation on the award of attorney's fees, an undesirable emphasis might be placed on the importance of the recovery of damages in civil rights litigation. The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief. Affirming the decision below would create an artificial disincentive for an attorney who enters into a contingent-fee agreement, unsure of whether his client's claim sounded in state tort law or in federal civil rights, from fully exploring all possible avenues of relief. Section 1988 makes no distinction between actions for damages and suits for equitable relief.

Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the action seeks monetary damages.

It should also be noted that we have not accepted the contention that fee awards in § 1983 damages cases should be modeled upon the contingent-fee arrangements used in personal injury litigation. "[W]e reject the notion that a civil rights action for damages constitutes nothing more than a private tort suit benefiting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." *Riverside* v. *Rivera*, 477 U. S. 561, 574 (1986).

Respondent cautions us that refusing to limit recovery to the amount of the contingency agreement will result in a "windfall" to attorneys who accept § 1983 actions. Yet the very nature of recovery under § 1988 is designed to prevent any such "windfall." Fee awards are to be reasonable, reasonable as to billing rates and reasonable as to the number of hours spent in advancing the successful claims. Accordingly, fee awards, properly calculated, by definition will represent the reasonable worth of the services rendered in vindication of a plaintiff's civil rights claim. It is central to the awarding of attorney's fees under § 1988 that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case. The trial judge should not be limited by the contractual fee agreement between plaintiff and counsel.

The contingent-fee model, premised on the award to an attorney of an amount representing a percentage of the damages, is thus inappropriate for the determination of fees under § 1988. The attorney's fee provided for in a contingent-fee agreement is not a ceiling upon the fees recoverable under § 1988. Accordingly, we reverse and remand.

III

Blanchard also complains of the failure of the court below to award fees in compensation for the time of paralegals and law clerks. Because the Court of Appeals held that recovery for legal fees was to be limited by the contingency agreement, that court never addressed the issue of separate billing for legal assistants. "[A]ny hours 'billed' by law clerks or paralegals would also naturally be included within the contingency fee." 831 F. 2d, at 564. Since we hold today that the contingency-fee arrangement does not control the award for attorney's fees, the determination of the total fee will be considered on remand. We reserve for another day the question whether legal assistants' fees should be included in the award.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I concur in the judgment and join the opinion of the Court except that portion which rests upon detailed analysis of the Fifth Circuit's opinion in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (1974), and the District Court decisions in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F. R. D. 483 (WDNC 1975); *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680 (ND Cal. 1974); and *Davis* v. *County of Los Angeles*, 8 EPD ¶9444 (CD Cal. 1974). See *ante*, at 91–93. The Court carefully examines those opinions, separating holding from dictum, much as a lower court would study our opinions in order to be faithful to our guidance. The justification for this role reversal is that the Senate and House Committee Reports on the Civil Rights Attorney's Fees Awards Act of 1976 referred approvingly to *Johnson*, and the Senate Report alone referred to the three District

Court opinions as having "correctly applied" *Johnson*. The Court resolves the difficulty that *Johnson* contradicts the three District Court opinions on the precise point at issue here by concluding in effect that the analysis in *Johnson* was dictum, whereas in the three District Court opinions it was a holding. Despite the fact that the House Report referred *only* to *Johnson*, and made no mention of the District Court cases, the Court "doubt[s] that Congress embraced this aspect of *Johnson*, for it pointed to the three District Court cases in which the factors are 'correctly applied.'" *Ante*, at 92.

In my view Congress did no such thing. Congress is elected to enact statutes rather than point to cases, and its Members have better uses for their time than poring over District Court opinions. That the Court should refer to the citation of three District Court cases in a document issued by a single committee of a single house as the action *of Congress* displays the level of unreality that our unrestrained use of legislative history has attained. I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote; that very few of those who did read them set off for the nearest law library to check out what was actually said in the four cases at issue (or in the more than 50 other cases cited by the House and Senate Reports); and that *no* Member of Congress came to the judgment that the District Court cases would trump *Johnson* on the point at issue here because the latter was dictum. As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant (for that end *Johnson* would not merely have been

cited, but its 12 factors would have been described, which they were not), but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.

I decline to participate in this process. It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind. By treating *Johnson* and the District Court trilogy as fully authoritative, the Court today expands what I regard as our cases' excessive preoccupation with them—and with the 12-factor *Johnson* analysis in particular. See, *e. g.*, *Blum* v. *Stenson*, 465 U. S. 886, 893–896, 900 (1984); *Hensley* v. *Eckerhart*, 461 U. S. 424, 429–432, 434–435 (1983). This expansion is all the more puzzling because I had thought that in the first *Delaware Valley* case, *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U. S. 546 (1986), we had acknowledged our emancipation from *Johnson*, see 478 U. S., at 563–565. Indeed, the plurality opinion in the second *Delaware Valley* case, *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U. S. 711, 723–724 (1987) *(Delaware Valley II)*, discussed *Johnson* and the other three cases almost exclusively by way of refuting arguments made in reliance upon them in JUSTICE BRENNAN's separate opinion in *Blum* v. *Stenson*, *supra*, at 902–903. Moreover, the concurring opinion that formed the fifth vote for the judgment in *Delaware Valley II* did not discuss the four cases at all. 483 U. S., at 731–734 (O'CONNOR, J., concurring in part and concurring in judgment). Except for the few passages to which I object, today's opinion admirably follows our more

recent approach of seeking to develop an interpretation of the statute that is reasonable, consistent, and faithful to its apparent purpose, rather than to achieve obedient adherence to cases cited in the committee reports. I therefore join the balance of the opinion.

Syllabus

FIRESTONE TIRE & RUBBER CO. ET AL. *v.* BRUCH ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87–1054. Argued November 30, 1988—Decided February 21, 1989

Petitioner Firestone Tire & Rubber Co. (Firestone) maintained, and was the plan administrator and fiduciary of, a termination pay plan and two other unfunded employee benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1001 *et seq.* After Firestone sold its Plastics Division to Occidental Petroleum Co. (Occidental), respondents, Plastics Division employees who were rehired by Occidental, sought severance benefits under the termination pay plan, but Firestone denied their requests on the ground that there had not been a "reduction in work force" that would authorize benefits under the plan's terms. Several respondents also sought information about their benefits under all three plans pursuant to § 1024(b)(4)'s disclosure requirements, but Firestone denied those requests on the ground that respondents were no longer plan "participants" entitled to information under ERISA. Respondents then brought suit for severance benefits under § 1132(a)(1)(B) and for damages under §§ 1132(a)(1)(A) and (c)(1)(B) based on Firestone's breach of its statutory disclosure obligation. The Federal District Court granted summary judgment for Firestone, holding that the company had satisfied its fiduciary duty as to the benefits requests because its decision not to pay was not arbitrary or capricious, and that it had no disclosure obligation to respondents because they were not plan "participants" within the meaning of § 1002(7) at the time they requested the information. The Court of Appeals reversed and remanded, holding that benefits denials should be subject to *de novo* judicial review rather than review under the arbitrary and capricious standard where the employer is itself the administrator and fiduciary of an unfunded plan, since deference is unwarranted in that situation given the lack of assurance of impartiality on the employer's part. The Court of Appeals also held that the right to disclosure of plan information extends both to people who are entitled to plan benefits and to those who claim to be, but are not, so entitled.

Held:

1. *De novo* review is the appropriate standard for reviewing Firestone's denial of benefits to respondents. Pp. 108–115.

(a) The arbitrary and capricious standard—which was developed under the Labor Management Relations Act, 1947 (LMRA) and adopted by some federal courts for § 1132(a)(1)(B) actions in light of ERISA's failure to provide an appropriate standard of review for that section—should not be imported into ERISA on a wholesale basis. The *raison d'être* for the LMRA standard—the need for a jurisdictional basis in benefits denial suits against joint labor-management pension plan trustees whose decisions are not expressly made reviewable by the LMRA—is not present in ERISA, which explicitly authorizes suits against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with plans. Without this jurisdictional analogy, LMRA principles offer no support for the adoption of the arbitrary and capricious standard insofar as § 1132 (a)(1)(B) is concerned. Pp. 108–110.

(b) Principles of the law of trusts—which must guide the present determination under ERISA's language and legislative history and this Court's decisions interpreting the statute—establish that a denial of benefits challenged under § 1132(a)(1)(B) must be reviewed under a *de novo* standard unless the benefit plan expressly gives the plan administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the plan's terms, in which cases a deferential standard of review is appropriate. The latter exception cannot aid Firestone, since there is no evidence that under the termination pay plan the administrator has the power to construe uncertain plan terms or that eligibility determinations are to be given deference. Firestone's argument that plan interpretation is inherently discretionary is belied by other settled trust law principles whereby courts construe trust agreements without deferring to either party's interpretation. Moreover, ERISA provisions that define a fiduciary as one who "exercises any discretionary authority," give him control over the plan's operation and administration, and require that he provide a "full and fair review" of claim denials cannot be interpreted to empower him to exercise *all* his authority in a discretionary manner. Adopting Firestone's interpretation would afford employees and their beneficiaries less protection than they received under pre-ERISA cases, which applied a *de novo* standard in interpreting plans, a result that Congress could not have intended in light of ERISA's stated purpose of "promot[ing] the interest of employees and their beneficiaries." The fact that, after ERISA's passage, Congress failed to act upon a bill to amend § 1132 to provide *de novo* review of benefits denial decisions does not indicate congressional approval of the arbitrary and capricious standard that had by then been adopted by most courts, since the bill's demise may have resulted from events having nothing to do with Congress' views on the relative merits of the two

standards, and since the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one. Firestone's assertion that the *de novo* standard would impose higher administrative and litigation costs on plans and thereby discourage employers from creating plans in contravention of ERISA's spirit is likewise unpersuasive, since there is nothing to foreclose parties from agreeing upon a narrower standard of review, and since the threat of increased litigation is not sufficient to outweigh the reasons for a *de novo* standard. Those reasons have nothing to do with the concern for impartiality that guided the Court of Appeals, and the *de novo* standard applies regardless of whether the plan at issue is funded or unfunded and whether the administrator or fiduciary is operating under a conflict of interest. If a plan gives discretion to such an official, however, the conflict must be weighed as a factor in determining whether there is an abuse of discretion. Pp. 110–115.

2. A "participant" entitled to disclosure under § 1024(b)(4) and to damages for failure to disclose under § 1132(c)(1)(B) does not include a person who merely claims to be, but is not, entitled to a plan benefit. The Court of Appeals' interpretation to the contrary strays far from the statutory language, which does not say that all "claimants" are entitled to disclosure; begs the question of who is a "participant"; and renders the § 1002(7) definition of "participant" superfluous. Rather, that definition of a "participant" as "any employee or former employee . . . who is or may become eligible" for benefits must be naturally read to mean either an employee in, or reasonably expected to be in, currently covered employment, or a former employee who has a reasonable expectation of returning to covered employment or a colorable claim to vested benefits. Moreover, a claimant must have a colorable claim that (1) he will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future in order to establish that he "may be eligible." This view attributes conventional meanings to the statutory language, since the "may become eligible" phrase clearly encompasses all employees in covered employment and former employees with a colorable claim to vested benefits, but simply does not apply to a former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits. Congress' purpose in enacting the ERISA disclosure provisions—ensuring that the individual participant knows exactly where he stands—will not be thwarted by this natural reading of "participant," since a rational plan administrator or fiduciary faced with the possibility of $100-a-day penalties under § 1132(c)(1)(B) for failure to disclose would likely opt to provide a claimant with the requested information if there were any doubt that he was a participant, especially since the claimant could be required to pay the reasonable

costs of producing the information under § 1024(b)(4) and Department of Labor regulations. Since the Court of Appeals did not attempt to determine whether respondents were "participants" with respect to the plans about which they sought information, it must do so on remand. Pp. 115–118.

828 F. 2d 134, affirmed in part, reversed in part, and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Part III, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and KENNEDY, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 119.

Martin Wald argued the cause for petitioners. With him on the briefs were *James D. Crawford*, *Deena Jo Schneider*, *Steve D. Shadowen*, and *Thomas M. Forman*.

David M. Silberman argued the cause for respondents. With him on the brief were *Laurence Gold*, *Paula R. Markowitz*, and *Bruce R. Lerner*.

Christopher J. Wright argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Fried*, *Deputy Solicitor General Ayer*, *George R. Salem*, *Charles I. Hadden*, and *Jeffrey A. Hennemuth*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents two questions concerning the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat.

*Briefs of *amici curiae* urging reversal were filed for the American Council of Life Insurance et al. by *Phillip E. Stano*, *Jack H. Blaine*, and *David J. Larkin, Jr.*; for the Chamber of Commerce of the United States et al. by *Rex E. Lee*, *Carter G. Phillips*, *Mark D. Hopson*, *Stephen A. Bokat*, *Robin S. Conrad*, *Jan S. Amundson*, and *Quentin Riegel*; for the ERISA Industry Committee by *John M. Vine*, *Harris Weinstein*, and *Elliott Schulder*; and for the Travelers Insurance Co. by *Carol H. Jewett*.

Briefs of *amici curiae* urging affirmance were filed for the Plaintiff Employment Lawyers Association by *Paul H. Tobias*; and for the Pension Rights Center by *Karen W. Ferguson* and *Terisa E. Chaw*.

Christopher G. Mackaronis and *Cathy Ventrell-Monsees* filed a brief for the American Association of Retired Persons as *amicus curiae*.

829, as amended, 29 U. S. C. § 1001 *et seq.* First, we address the appropriate standard of judicial review of benefit determinations by fiduciaries or plan administrators under ERISA. Second, we determine which persons are "participants" entitled to obtain information about benefit plans covered by ERISA.

I

Late in 1980, petitioner Firestone Tire and Rubber Company (Firestone) sold, as going concerns, the five plants composing its Plastics Division to Occidental Petroleum Company (Occidental). Most of the approximately 500 salaried employees at the five plants were rehired by Occidental and continued in their same positions without interruption and at the same rates of pay. At the time of the sale, Firestone maintained three pension and welfare benefit plans for its employees: a termination pay plan, a retirement plan, and a stock purchase plan. Firestone was the sole source of funding for the plans and had not established separate trust funds out of which to pay the benefits from the plans. All three of the plans were either "employee welfare benefit plans" or "employee pension benefit plans" governed (albeit in different ways) by ERISA. By operation of law, Firestone itself was the administrator, 29 U. S. C. § 1002(16)(A)(ii), and fiduciary, § 1002(21)(A), of each of these "unfunded" plans. At the time of the sale of its Plastics Division, Firestone was not aware that the termination pay plan was governed by ERISA, and therefore had not set up a claims procedure, § 1133, nor complied with ERISA's reporting and disclosure obligations, §§ 1021–1031, with respect to that plan.

Respondents, six Firestone employees who were rehired by Occidental, sought severance benefits from Firestone under the termination pay plan. In relevant part, that plan provides as follows:

> "If your service is discontinued prior to the time you are eligible for pension benefits, you will be given termination pay if released because of a reduction in work

force or if you become physically or mentally unable to perform your job.

"The amount of termination pay you will receive will depend on your period of credited company service."

Several of the respondents also sought information from Firestone regarding their benefits under all three of the plans pursuant to certain ERISA disclosure provisions. See §§ 1024(b)(4), 1025(a). Firestone denied respondents severance benefits on the ground that the sale of the Plastics Division to Occidental did not constitute a "reduction in work force" within the meaning of the termination pay plan. In addition, Firestone denied the requests for information concerning benefits under the three plans. Firestone concluded that respondents were not entitled to the information because they were no longer "participants" in the plans.

Respondents then filed a class action on behalf of "former, salaried, non-union employees who worked in the five plants that comprised the Plastics Division of Firestone." Complaint ¶ 9, App. 94. The action was based on § 1132(a)(1), which provides that a "civil action may be brought . . . by a participant or beneficiary [of a covered plan] . . . (A) for the relief provided for in [§ 1132(c)], [and] (B) to recover benefits due to him under the terms of his plan." In Count I of their complaint, respondents alleged that they were entitled to severance benefits because Firestone's sale of the Plastics Division to Occidental constituted a "reduction in work force" within the meaning of the termination pay plan. Complaint ¶¶ 23–44, App. 98–104. In Count VII, respondents alleged that they were entitled to damages under § 1132 (c) because Firestone had breached its reporting obligations under § 1025(a). Complaint ¶¶ 87–94, App. 104–106.

The District Court granted Firestone's motion for summary judgment. 640 F. Supp. 519 (ED Pa. 1986). With respect to Count I, the District Court held that Firestone had satisfied its fiduciary duty under ERISA because its decision not to pay severance benefits to respondents under the ter-

mination pay plan was not arbitrary or capricious. *Id.*, at 521–526. With respect to Count VII, the District Court held that, although § 1024(b)(4) imposes a duty on a plan administrator to respond to written requests for information about the plan, that duty extends only to requests by plan participants and beneficiaries. Under ERISA a plan participant is "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." § 1002(7). A beneficiary is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." § 1002(8). The District Court concluded that respondents were not entitled to damages under § 1132(c) because they were not plan "participants" or "beneficiaries" at the time they requested information from Firestone. 640 F. Supp., at 534.

The Court of Appeals reversed the District Court's grant of summary judgment on Counts I and VII. 828 F. 2d 134 (CA3 1987). With respect to Count I, the Court of Appeals acknowledged that most federal courts have reviewed the denial of benefits by ERISA fiduciaries and administrators under the arbitrary and capricious standard. *Id.*, at 138 (citing cases). It noted, however, that the arbitrary and capricious standard had been softened in cases where fiduciaries and administrators had some bias or adverse interest. *Id.*, at 138–140. See, *e. g.*, *Jung* v. *FMC Corp.*, 755 F. 2d 708, 711–712 (CA9 1985) (where "the employer's denial of benefits to a class avoids a very considerable outlay [by the employer], the reviewing court should consider that fact in applying the arbitrary and capricious standard of review," and "[l]ess deference should be given to the trustee's decision"). The Court of Appeals held that where an employer is itself the fiduciary and administrator of an unfunded benefit plan, its decision to deny benefits should be subject to *de novo* judicial review. It reasoned that in such situations deference is unwarranted given the lack of assurance of impartiality on

the part of the employer. 828 F. 2d, at 137–145. With respect to Count VII, the Court of Appeals held that the right to request and receive information about an employee benefit plan "most sensibly extend[s] both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not." *Id.*, at 153. Because the District Court had applied different legal standards in granting summary judgment in favor of Firestone on Counts I and VII, the Court of Appeals remanded the case for further proceedings consistent with its opinion.

We granted certiorari, 485 U. S. 986 (1988), to resolve the conflicts among the Courts of Appeals as to the appropriate standard of review in actions under § 1132(a)(1)(B) and the interpretation of the term "participant" in § 1002(7). We now affirm in part, reverse in part, and remand the case for further proceedings.

II

ERISA provides "a panoply of remedial devices" for participants and beneficiaries of benefit plans. *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U. S. 134, 146 (1985). Respondents' action asserting that they were entitled to benefits because the sale of Firestone's Plastics Division constituted a "reduction in work force" within the meaning of the termination pay plan was based on the authority of § 1132(a)(1)(B). That provision allows a suit to recover benefits due under the plan, to enforce rights under the terms of the plan, and to obtain a declaratory judgment of future entitlement to benefits under the provisions of the plan contract. The discussion which follows is limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations. We express no view as to the appropriate standard of review for actions under other remedial provisions of ERISA.

A

Although it is a "comprehensive and reticulated statute," *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446

U. S. 359, 361 (1980), ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations. To fill this gap, federal courts have adopted the arbitrary and capricious standard developed under 61 Stat. 157, 29 U. S. C. § 186(c), a provision of the Labor Management Relations Act, 1947 (LMRA). See, *e. g.*, *Struble* v. *New Jersey Brewery Employees' Welfare Trust Fund*, 732 F. 2d 325, 333 (CA3 1984); *Bayles* v. *Central States, Southeast and Southwest Areas Pension Fund*, 602 F. 2d 97, 99–100, and n. 3 (CA5 1979). In light of Congress' general intent to incorporate much of LMRA fiduciary law into ERISA, see *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 332 (1981), and because ERISA, like the LMRA, imposes a duty of loyalty on fiduciaries and plan administrators, Firestone argues that the LMRA arbitrary and capricious standard should apply to ERISA actions. See Brief for Petitioners 13–14. A comparison of the LMRA and ERISA, however, shows that the *wholesale* importation of the arbitrary and capricious standard into ERISA is unwarranted.

In relevant part, 29 U. S. C. § 186(c) authorizes unions and employers to set up pension plans jointly and provides that contributions to such plans be made "for the sole and exclusive benefit of the employees . . . and their families and dependents." The LMRA does not provide for judicial review of the decisions of LMRA trustees. Federal courts adopted the arbitrary and capricious standard both as a standard of review and, more importantly, as a means of asserting jurisdiction over suits under § 186(c) by beneficiaries of LMRA plans who were denied benefits by trustees. See *Van Boxel* v. *Journal Co. Employees' Pension Trust*, 836 F. 2d 1048, 1052 (CA7 1987) ("[W]hen a plan provision as interpreted had the effect of denying an application for benefits unreasonably, or as it came to be said, arbitrarily and capriciously, courts would hold that the plan as 'structured' was not for the sole and exclusive benefit of the employees, so that the denial of

benefits violated [§ 186(c)])." See also Comment, The Arbitrary and Capricious Standard Under ERISA: Its Origins and Application, 23 Duquesne L. Rev. 1033, 1037–1039 (1985). Unlike the LMRA, ERISA explicitly authorizes suits against fiduciaries and plan administrators to remedy statutory violations, including breaches of fiduciary duty and lack of compliance with benefit plans. See 29 U. S. C. §§ 1132(a), 1132(f). See generally *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 52–57 (1987) (describing scope of § 1132(a)). Thus, the *raison d'être* for the LMRA arbitrary and capricious standard—the need for a jurisdictional basis in suits against trustees—is not present in ERISA. See Note, Judicial Review of Fiduciary Claim Denials Under ERISA: An Alternative to the Arbitrary and Capricious Test, 71 Cornell L. Rev. 986, 994, n. 40 (1986). Without this jurisdictional analogy, LMRA principles offer no support for the adoption of the arbitrary and capricious standard insofar as § 1132(a)(1)(B) is concerned.

B

ERISA abounds with the language and terminology of trust law. See, *e. g.*, 29 U. S. C. §§ 1002(7) ("participant"), 1002(8) ("beneficiary"), 1002(21)(A) ("fiduciary"), 1103(a) ("trustee"), 1104 ("fiduciary duties"). ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U. S. C. §§ 1101–1114, "codif[y] and mak[e] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." H. R. Rep. No. 93–533, p. 11 (1973). Given this language and history, we have held that courts are to develop a "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co.* v. *Dedeaux*, *supra*, at 56. See also *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U. S. 1, 24, n. 26 (1983) ("'[A] body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans'") (quoting 129 Cong. Rec. 29942 (1974) (remarks of Sen. Ja-

vits)). In determining the appropriate standard of review for actions under § 1132(a)(1)(B), we are guided by principles of trust law. *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U. S. 559, 570 (1985).

Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. See Restatement (Second) of Trusts § 187 (1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court except to prevent an abuse by the trustee of his discretion"). See also G. Bogert & G. Bogert, Law of Trusts and Trustees § 560, pp. 193–208 (2d rev. ed. 1980). A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable. *Id.*, § 559, at 169–171. Whether "the exercise of a power is permissive or mandatory depends upon the terms of the trust." 3 W. Fratcher, Scott on Trusts § 187, p. 14 (4th ed. 1988). Hence, over a century ago we remarked that "[w]hen trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a *discretion vested in them by the instrument* under which they act." *Nichols* v. *Eaton*, 91 U. S. 716, 724–725 (1875) (emphasis added). See also *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, *supra*, at 568 ("The trustees' determination that the trust documents authorize their access to records here in dispute has significant weight, for the trust agreement explicitly provides that 'any construction [of the agreement's provisions] adopted by the Trustees in good faith shall be binding upon the Union, Employees, and Employers'"). Firestone can seek no shelter in these principles of trust law, however, for there is no evidence that under Firestone's termination pay plan the administrator has the power to construe uncertain terms or that eligibility determinations are to be given deference. See Brief for Respond-

ents 24–25; Reply Brief for Petitioners 7, n. 2; Brief for United States as *Amicus Curiae* 14–15, n. 11.

Finding no support in the language of its termination pay plan for the arbitrary and capricious standard, Firestone argues that as a matter of trust law the interpretation of the terms of a plan is an inherently discretionary function. But other settled principles of trust law, which point to *de novo* review of benefit eligibility determinations based on plan interpretations, belie this contention. As they do with contractual provisions, courts construe terms in trust agreements without deferring to either party's interpretation. "The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be applicable, and by the terms of the trust *as the court may interpret them*, and not as they may be interpreted by the trustee himself or by his attorney." 3 W. Fratcher, Scott on Trusts § 201, at 221 (emphasis added). A trustee who is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court. Bogert & Bogert, *supra*, § 559, at 162–168; Restatement (Second) of Trusts § 201, Comment *b* (1959). See also *United States* v. *Mason*, 412 U. S. 391, 399 (1973). The terms of trusts created by written instruments are "determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible." Restatement (Second) of Trusts § 4, Comment *d* (1959).

The trust law *de novo* standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA. Actions challenging an employer's denial of benefits before the enactment of ERISA were governed by principles of contract law. If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claim as it would have any other contract claim—

by looking to the terms of the plan and other manifestations of the parties' intent. See, *e. g.*, *Conner* v. *Phoenix Steel Corp.*, 249 A. 2d 866 (Del. 1969); *Atlantic Steel Co.* v. *Kitchens*, 228 Ga. 708, 187 S. E. 2d 824 (1972); *Sigman* v. *Rudolph Wurlitzer Co.*, 57 Ohio App. 4, 11 N. E. 2d 878 (1937).

Despite these principles of trust law pointing to a *de novo* standard of review for claims like respondents', Firestone would have us read ERISA to require the application of the arbitrary and capricious standard to such claims. ERISA defines a fiduciary as one who "exercises any discretionary authority or discretionary control respecting management of [a] plan or exercises any authority or control respecting management or disposition of its assets." 29 U. S. C. § 1002(21)(A)(i). A fiduciary has "authority to control and manage the operation and administration of the plan," § 1102(a)(1), and must provide a "full and fair review" of claim denials, § 1133(2). From these provisions, Firestone concludes that an ERISA plan administrator, fiduciary, or trustee is empowered to exercise *all* his authority in a discretionary manner subject only to review for arbitrariness and capriciousness. But the provisions relied upon so heavily by Firestone do not characterize a fiduciary as one who exercises *entirely* discretionary authority or control. Rather, one is a fiduciary to the extent he exercises *any* discretionary authority or control. Cf. *United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U. S. 562, 573–574 (1982) (common law of trusts did not alter nondiscretionary obligation of trustees to enforce eligibility requirements as required by LMRA trust agreement).

ERISA was enacted "to promote the interests of employees and their beneficiaries in employee benefit plans," *Shaw* v. *Delta Airlines, Inc.*, 463 U. S. 85, 90 (1983), and "to protect contractually defined benefits," *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U. S., at 148. See generally 29 U. S. C. § 1001 (setting forth congressional findings and declarations of policy regarding ERISA). Adopting Firestone's

reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted. Nevertheless, Firestone maintains that congressional action after the passage of ERISA indicates that Congress intended ERISA claims to be reviewed under the arbitrary and capricious standard. At a time when most federal courts had adopted the arbitrary and capricious standard of review, a bill was introduced in Congress to amend § 1132 by providing *de novo* review of decisions denying benefits. See H. R. 6226, 97th Cong., 2d Sess. (1982), reprinted in Pension Legislation: Hearings on H. R. 1614 et al. before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 97th Cong., 2d Sess., 60 (1983). Because the bill was never enacted, Firestone asserts that we should conclude that Congress was satisfied with the arbitrary and capricious standard. See Brief for Petitioners 19–20. We do not think that this bit of legislative inaction carries the day for Firestone. Though "instructive," failure to act on the proposed bill is not conclusive of Congress' views on the appropriate standard of review. *Bowsher* v. *Merck & Co.*, 460 U. S. 824, 837, n. 12 (1983). The bill's demise may have been the result of events that had nothing to do with Congress' view on the propriety of *de novo* review. Without more, we cannot ascribe to Congress any acquiescence in the arbitrary and capricious standard. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price*, 361 U. S. 304, 313 (1960).

Firestone and its *amici* also assert that a *de novo* standard would contravene the spirit of ERISA because it would impose much higher administrative and litigation costs and therefore discourage employers from creating benefit plans. See, *e. g.*, Brief for American Council of Life Insurance et al. as *Amici Curiae* 10–11. Because even under the arbitrary and capricious standard an employer's denial of benefits could

be subject to judicial review, the assumption seems to be that a *de novo* standard would encourage more litigation by employees, participants, and beneficiaries who wish to assert their right to benefits. Neither general principles of trust law nor a concern for impartial decisionmaking, however, forecloses parties from agreeing upon a narrower standard of review. Moreover, as to both funded and unfunded plans, the threat of increased litigation is not sufficient to outweigh the reasons for a *de novo* standard that we have already explained.

As this case aptly demonstrates, the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue. Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan. Because we do not rest our decision on the concern for impartiality that guided the Court of Appeals, see 828 F. 2d, at 143–146, we need not distinguish between types of plans or focus on the motivations of plan administrators and fiduciaries. Thus, for purposes of actions under § 1132(a)(1)(B), the *de novo* standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the administrator or fiduciary is operating under a possible or actual conflict of interest. Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a "facto[r] in determining whether there is an abuse of discretion." Restatement (Second) of Trusts § 187, Comment *d* (1959).

III

Respondents unsuccessfully sought plan information from Firestone pursuant to 29 U. S. C. § 1024(b)(4), one of

ERISA's disclosure provisions. That provision reads as follows:

> "The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary [of Labor] may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence."

When Firestone did not comply with their request for information, respondents sought damages under 29 U. S. C. § 1132 (c)(1)(B) (1982 ed., Supp. IV), which provides that "[a]ny administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary . . . may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day."

Respondents have not alleged that they are "beneficiaries" as defined in § 1002(8). See Complaint ¶¶ 87–95, App. 104–106. The dispute in this case therefore centers on the definition of the term "participant," which is found in § 1002(7):

> "The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit."

The Court of Appeals noted that § 1132(a)(1) allows suits for benefits "by a participant or beneficiary." Finding that it would be illogical to say that a person could only bring a claim for benefits if he or she was entitled to benefits, the Court of

Appeals reasoned that § 1132(a)(1) should be read to mean that "'a civil action may be brought by *someone who claims to be* a participant or beneficiary.'" 828 F. 2d, at 152. It went on to conclude that the same interpretation should apply with respect to § 1024(b)(4): "A provision such as that one, entitling people to information on the extent of their benefits, would most sensibly extend both to people who are in fact entitled to a benefit under the plan and to those who claim to be but in fact are not." *Id.*, at 153.

The Court of Appeals "concede[d] that it is expensive and inefficient to provide people with information about benefits—and to permit them to obtain damages if information is withheld—if they are clearly not entitled to the benefits about which they are informed." *Ibid.* It tried to solve this dilemma by suggesting that courts use discretion and not award damages if the employee's claim for benefits was not colorable or if the employer did not act in bad faith. There is, however, a more fundamental problem with the Court of Appeals' interpretation of the term "participant": it strays far from the statutory language. Congress did not say that all "claimants" could receive information about benefit plans. To say that a "participant" is any person who claims to be one begs the question of who is a "participant" and renders the definition set forth in § 1002(7) superfluous. Indeed, respondents admitted at oral argument that "the words point against [them]." Tr. of Oral Arg. 40.

In our view, the term "participant" is naturally read to mean either "employees in, or reasonably expected to be in, currently covered employment," *Saladino* v. *I. L. G. W. U. National Retirement Fund*, 754 F. 2d 473, 476 (CA2 1985), or former employees who "have . . . a reasonable expectation of returning to covered employment" or who have "a colorable claim" to vested benefits, *Kuntz* v. *Reese*, 785 F. 2d 1410, 1411 (CA9) *(per curiam)*, cert. denied, 479 U. S. 916 (1986). In order to establish that he or she "may become eligible" for benefits, a claimant must have a colorable claim that (1) he or she will prevail in a suit for benefits, or that (2) eligibility re-

quirements will be fulfilled in the future. "This view attributes conventional meanings to the statutory language since all employees in covered employment and former employees with a colorable claim to vested benefits 'may become eligible.' A former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits, however, simply does not fit within the [phrase] 'may become eligible.'" *Saladino* v. *I. L. G. W. U. National Retirement Fund*, *supra*, at 476.

We do not think Congress' purpose in enacting the ERISA disclosure provisions—ensuring that "the individual participant knows exactly where he stands with respect to the plan," H. R. Rep. No. 93–533, p. 11 (1973)—will be thwarted by a natural reading of the term "participant." Faced with the possibility of $100 a day in penalties under § 1132(c)(1)(B), a rational plan administrator or fiduciary would likely opt to provide a claimant with the information requested if there is any doubt as to whether the claimant is a "participant," especially when the reasonable costs of producing the information can be recovered. See 29 CFR § 2520.104b–30(b) (1987) (the "charge assessed by the plan administrator to cover the costs of furnishing documents is reasonable if it is equal to the actual cost per page to the plan for the least expensive means of acceptable reproduction, but in no event may such charge exceed 25 cents per page").

The Court of Appeals did not attempt to determine whether respondents were "participants" under § 1002(7). See 828 F. 2d, at 152–153. We likewise express no views as to whether respondents were "participants" with respect to the benefit plans about which they sought information. Those questions are best left to the Court of Appeals on remand.

For the reasons set forth above, the decision of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion.

So ordered.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the judgment of the Court and Parts I and II of its opinion. I agree with its disposition but not all of its reasoning regarding Part III.

The Court holds that a person with a colorable claim is one who "'may become eligible' for benefits" within the meaning of the statutory definition of "participant," because, it reasons, such a claim raises the possibility that "he or she will prevail in a suit for benefits." *Ante*, at 117. The relevant portion of the definition, however, refers to an employee "who *is or may become* eligible to receive a benefit." There is an obvious parallelism here: one "may become" eligible by acquiring, in the future, the same characteristic of eligibility that someone who "is" eligible now possesses. And I find it contrary to normal usage to think that the characteristic of "being" eligible consists of "having prevailed in a suit for benefits." Eligibility exists not merely during the brief period between formal judgment of entitlement and payment of benefits. Rather, one *is* eligible whether or not he has yet been adjudicated to be—and, similarly, one can *become* eligible before he is adjudicated to be. It follows that the phrase "may become eligible" has nothing to do with the probabilities of winning a suit. I think that, properly read, the definition of "participant" embraces those whose benefits have vested, and those who (by reason of current or former employment) have some potential to receive the vesting of benefits in the future, but not those who have a good argument that benefits have vested even though they have not.

Applying the definition in this fashion would mean, of course, that if the employer guesses right that a person with a colorable claim is in fact not entitled to benefits, he can deny that person the information required to be provided under 29 U. S. C. § 1024(b)(4) without paying the $100-a-day damages assessable for breach of that obligation, 29 U. S. C. § 1132(c)(1)(B) (1982 ed., Supp. IV). Since, however, no em-

ployer sensible enough to consult the law would be senseless enough to take that risk, giving the term its defined meaning would produce precisely the same incentive for disclosure as the Court's opinion.

MESA ET AL. *v.* CALIFORNIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-1206. Argued December 6, 1988—Decided February 21, 1989

Petitioner mailtruck drivers, employees of the United States Postal Service, were separately charged in state criminal complaints with traffic violations arising out of unrelated incidents while they were operating their trucks, and they were arraigned in a California Municipal Court. The United States attorney filed petitions for removal of the complaints to Federal District Court pursuant to 28 U. S. C. § 1442(a)(1)—which provides for removal of a civil or criminal prosecution commenced in a state court against "[a]ny officer of the United States . . . , or person acting under him, for any act under color of such office . . ."—because petitioners were federal employees at the time of the incidents and because the charges arose from accidents involving petitioners that occurred while they were on duty and acting in the course and scope of their employment. The District Court granted the petitions. The Court of Appeals, after consolidating the petitions, issued a writ of mandamus ordering the District Court to deny the petitions and remand the prosecutions for trial in state court, holding that "federal postal workers may not remove state criminal prosecutions to federal court when they raise no colorable claim of federal immunity or other federal defense."

Held: Federal officer removal under § 1442(a) must be predicated upon averment of a federal defense. Pp. 124–139.

(a) For almost 125 years, this Court's decisions have understood § 1442(a) and its predecessor statutes to require such an averment. The test for federal officer removal under which "[t]here must be a causal connection between what the officer has done under asserted official authority and the state prosecution," *Maryland* v. *Soper (No. 1)*, 270 U. S. 9, 33, did not eliminate the federal defense requirement. And since petitioners have not and could not present an official immunity defense to the state prosecutions against them, the liberal pleadings sufficient to allege such a defense that were permitted in *Willingham* v. *Morgan*, 395 U. S. 402, 405, are inapplicable to removal of those prosecutions. Pp. 125–134.

(b) There is no merit to the Government's argument that the language "in the performance of his duties" used in § 1442(a)(3) that permits removal of actions or prosecutions against a federal court officer "for any act under color of office or in the performance of his duties" must mean

something besides "under color of office" in that provision and that therefore § 1442(a)(1) must be construed broadly to permit removal of any actions or prosecutions brought against a federal officer for acts done during the performance of his duties regardless of whether that officer raises a federal defense. There is no reason to depart from the long-standing interpretation that Congress meant by both "in the performance of his duties" and "under color of office" to preserve the pre-existing requirement of a federal defense for removal. Pp. 134–135.

(c) Section 1442(a) is a pure jurisdictional statute, granting district court jurisdiction over cases in which a federal officer is a defendant. The section, therefore, cannot independently support Art. III "arising under" jurisdiction. Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the officer arises for Art. III purposes. Adopting the Government's view, which would eliminate the federal defense requirement, would in turn eliminate the substantive Art. III foundation of § 1442(a)(1) and unnecessarily present grave constitutional problems. There is no need to adopt a theory of "protective jurisdiction" to support Art. III "arising under" jurisdiction, as the Government urges, because in this case there are no federal interests that are not protected by limiting removal to situations in which a federal defense is alleged. In the prosecutions at issue, no state court hostility or interference has even been alleged, and there is no federal interest in potentially forcing local district attorneys to choose between prosecuting traffic violations hundreds of miles from the municipality in which the violations occurred or abandoning those prosecutions. It is hardly consistent with the "strong judicial policy" against federal interference with state criminal proceedings to permit removal of state criminal prosecutions of federal officers and thereby impose potentially extraordinary burdens on the States when absolutely no federal question is even at issue in those prosecutions. Pp. 136–139.

813 F. 2d 960, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 140.

Deputy Solicitor General Ayer argued the cause for petitioners. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Bolton*, *Michael K. Kellogg*, *Barbara L. Herwig*, and *John S. Koppel*.

Kenneth Rosenblatt argued the cause and filed a brief for respondent.

JUSTICE O'CONNOR delivered the opinion of the Court.

We decide today whether United States Postal Service employees may, pursuant to 28 U. S. C. § 1442(a)(1), remove to Federal District Court state criminal prosecutions brought against them for traffic violations committed while on duty.

I

In the summer of 1985 petitioners Kathryn Mesa and Shabbir Ebrahim were employed as mailtruck drivers by the United States Postal Service in Santa Clara County, California. In unrelated incidents, the State of California issued criminal complaints against petitioners, charging Mesa with misdemeanor-manslaughter and driving outside a laned roadway after her mailtruck collided with and killed a bicyclist, and charging Ebrahim with speeding and failure to yield after his mailtruck collided with a police car. Mesa and Ebrahim were arraigned in the San Jose Municipal Court of Santa Clara County on September 16 and October 2, 1985, respectively. The Municipal Court set a pretrial conference in Mesa's case for November 4, 1985, and set trial for Ebrahim on November 7, 1985.

On September 24 and October 4, 1985, the United States Attorney for the Northern District of California filed petitions in the United States District Court for the Northern District of California for removal to that court of the criminal complaints brought against Ebrahim and Mesa. The petitions alleged that the complaints should properly be removed to the Federal District Court pursuant to 28 U. S. C. § 1442(a)(1) because Mesa and Ebrahim were federal employees at the time of the incidents and because "the state charges arose from an accident involving defendant which occurred while defendant was on duty and acting in the course and scope of her employment with the Postal Service." Mesa Petition for Removal of Criminal Action ¶3, App. 5. See also Ebrahim Petition for Removal of Criminal Action ¶3, App. 10 ("[T]he state charges arose from an accident in-

volving defendant which occurred while defendant was on duty"). The Santa Clara County District Attorney filed responsive motions to remand, contending that the State's actions against Mesa and Ebrahim were not removable under § 1442(a)(1). The District Court granted the United States Government's petitions for removal and denied California's motions for remand.

California thereupon petitioned the Court of Appeals for the Ninth Circuit to issue a writ of mandamus compelling the District Court to remand the cases to the state court. The Court of Appeals consolidated the petitions, and a divided panel held that "federal postal workers may not remove state criminal prosecutions to federal court when they raise no colorable claim of federal immunity or other federal defense." 813 F. 2d 960, 967 (1987). Accordingly, the Court of Appeals issued a writ of mandamus ordering the District Court to deny the United States' petitions for removal and remand the prosecutions for trial in the California state courts. We granted the United States' petition for certiorari on behalf of Mesa and Ebrahim, 486 U. S. 1021 (1988), to resolve a conflict among the Courts of Appeals concerning the proper interpretation of § 1442(a)(1). We now affirm.

II

The removal provision at issue in this case, 28 U. S. C. § 1442(a), provides:

> "A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> "(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the appre-

hension or punishment of criminals or the collection of the revenue.

"(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

"(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

"(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House."

The United States and California agree that Mesa and Ebrahim, in their capacity as employees of the United States Postal Service, were "person[s] acting under" an "officer of the United States or any agency thereof" within the meaning of § 1442(a)(1). Their disagreement concerns whether the California criminal prosecutions brought against Mesa and Ebrahim were "for act[s] under color of such office" within the meaning of that subsection. The United States, largely adopting the view taken by the Court of Appeals for the Third Circuit in *Pennsylvania* v. *Newcomer*, 618 F. 2d 246 (1980), would read "under color of office" to permit removal "whenever a federal official is prosecuted for the manner in which he has performed his federal duties . . . ." Brief for Petitioners 8. California, following the Court of Appeals below, would have us read the same phrase to impose a requirement that some federal defense be alleged by the federal officer seeking removal.

A

On numerous occasions in the last 121 years we have had the opportunity to examine § 1442(a) or one of its long line of statutory forebears. In *Willingham* v. *Morgan*, 395 U. S. 402, 405 (1969), we traced the "long history" of the federal officer removal statute from its origin in the Act of February 4, 1815, § 8, 3 Stat. 198, as a congressional response to New

England's opposition to the War of 1812, through its expansion in response to South Carolina's 1833 threats of nullification, and its further expansion in the Civil War era as the need to enforce revenue laws became acute, to enactment of the Judicial Code of 1948 when the removal statute took its present form encompassing all federal officers. 395 U. S., at 405–406. "The purpose of all these enactments," we concluded, "is not hard to discern. As this Court said . . . in *Tennessee* v. *Davis*, 100 U. S. 257, 263 (1880), the Federal Government

> "'can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members.'" *Id.*, at 406.

Tennessee v. *Davis*, 100 U. S. 257 (1880), involved a state murder prosecution brought against a revenue collector who claimed that, while he was in the act of seizing an illegal distillery under the authority of the federal revenue laws, "he was assaulted and fired upon by a number of armed men, and that in defence of his life he returned the fire," killing one of the assailants. *Id.*, at 261. Davis sought to remove the prosecution to federal court and Tennessee challenged the constitutionality of the removal statute. Rev. Stat. § 643. Justice Strong framed the question presented thus:

> "Has the Constitution conferred upon Congress the power to authorize the removal, from a State court to a Federal court, of an indictment against a revenue officer for an alleged crime against the State, and to order its

> removal before trial, *when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein?*" 100 U. S., at 262 (emphasis added).

Justice Strong's emphasis on the presence of a federal defense unifies the entire opinion. He thought it impossible that the Constitution should so weaken the Federal Government as to prevent it from protecting itself against unfriendly state legislation which "may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws [or] may deny the authority conferred by those laws." *Id.*, at 263.

Despite these references to a federal defense requirement, the United States argues that Davis justified the killing solely on grounds of self-defense and that the question whether Davis' act of self-defense was actually justified is purely a question of state law, there being no "federal common law of 'justification' applicable to crimes committed by federal employees in the performance of their duties . . . ." Brief for Petitioners 20, n. 7. Thus, the Government concludes, despite much contrary language in the opinion, the fact that we approved the removal of Davis' prosecution demonstrates that no federal defense is necessary to effect removal.

What the Government fails to note is that the successful legal defense of "self-defense" depends on the truth of two distinct elements: that the act committed was, in a legal sense, an act of self-defense, and that the act was justified, that is, warranted under the circumstances. In Davis' case, the truth of the first element depended on a question of federal law: was it Davis' duty under federal law to seize the distillery? If Davis had merely been a thief attempting to steal his assailants' property, returning their fire would simply not have been an act of self-defense, pretermitting any question of justification. Proof that Davis was not a thief depended on the federal revenue laws and provided the necessary pred-

icate for removal. See *In re Neagle*, 135 U. S. 1, 94 (1890) (Lamar, J., dissenting) ("In *Tennessee* v. *Davis* . . . [t]he homicide, for which the petitioner was prosecuted, was committed by him while executing his duties, as a revenue officer, in pursuance of the express requirements of the revenue laws, and in defence of his own life, upon a party offering *unlawful* resistance") (emphasis added); *Maryland* v. *Soper (No. 2)*, 270 U. S. 36, 42 (1926) ("Thus removals of prosecutions on account of acts done in enforcement of the revenue or prohibition laws or under color of them properly include those acts committed by a federal officer in defense of his life, threatened while enforcing or attempting to enforce the law. Such acts of defense are really part of the exercise of his official authority. They are necessary to make the enforcement effective"). Accordingly, as Justice Strong's conclusion in *Davis* makes clear, we upheld the constitutionality of the federal officer removal statute precisely because the statute predicated removal on the presence of a federal defense:

> "It ought, therefore, to be considered as settled that the constitutional powers of Congress to authorize the removal of criminal cases for alleged offences against State laws from State courts to the circuit courts of the United States, *when there arises a Federal question in them*, is as ample as its power to authorize the removal of a civil case." 100 U. S., at 271 (emphasis added).

Prior to *Davis*, we had considered the scope of congressional power to authorize the removal of a civil case in *The Mayor* v. *Cooper*, 6 Wall. 247 (1868), and again focused on the presence of a federal defense. Cooper sued the mayor and aldermen of Nashville, Tennessee, for trespasses on real estate and the asportation and conversion of chattels occurring during or shortly after the Civil War. The city officials sought to remove the suit to federal court under the federal officer removal statute. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 756. They contended that at the time of the alleged trespasses, the mayor and aldermen of Nashville were ap-

pointees of the Military Governor of Tennessee and that the trespasses were committed under the order of a Union general. Cooper contended that the removal statute was unconstitutional. In upholding the statute's constitutionality, we observed: "Nor is it any objection that questions are involved which are not all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. *That element is decisive upon the subject of jurisdiction.*" 6 Wall., at 252 (emphasis added). For purposes of removal, we only required the mayor and aldermen to allege a colorable defense under federal law; "[t]he validity of the defence authorized to be made is a distinct subject. It involves wholly different inquiries. . . . It has no connection whatever with the question of jurisdiction." *Id.*, at 254.

Although we have not always spoken with the same clarity that these early decisions evince, we have not departed from the requirement that federal officer removal must be predicated on the allegation of a colorable federal defense. The United States argues that *Cleveland, C., C. & I. R. Co.* v. *McClung*, 119 U. S. 454 (1886), stands for the proposition that a federal defense is not a prerequisite to removal. In *McClung* a railroad brought suit in state court for recovery of a lien, alleging that a collector of customs had a federal duty under § 10 of 21 Stat. 175 to notify the carrier claiming the lien before delivering merchandise to its ultimate consignees even if the consignees had paid over the lien to the collector. The collector sought to remove the suit to federal court, setting up as his defense that he had no duty to notify the carrier under the federal statute. Despite the obvious presence of a federal question—the proper interpretation of § 10 of the statute—the United States argues that, because the collector's defense was the *absence* of a federally created duty under the statute, his was not a federal defense. The argument is unavailing. Apart from the fact that the carrier itself could have brought suit in federal court based on "arising under" jurisdiction, the collector's defense was clearly

based on the statute's determination of the scope of his duties. To assert that a federal statute does *not* impose certain obligations whose alleged existence forms the basis of a civil suit is to rely on the statute in just the same way as asserting that the statute *does* impose other obligations that may shield the federal officer against civil suits. Both are equally defensive and equally based in federal law.

A later railroad case, *Gay* v. *Ruff*, 292 U. S. 25 (1934), points more definitively to our continuing understanding that federal officer removal must be predicated on a federal defense. *Gay* was a civil action but with facts remarkably similar to those in the criminal complaint brought against Mesa. Ruff filed suit in state court against Gay, the receiver of a railroad appointed by a Federal District Court, for the wrongful death of his son as a result of the negligent operation of a train by employees of the receiver. Gay sought to remove the action to federal court pursuant to § 33 of the Judicial Code, Act of Aug. 23, 1916, ch. 399, 39 Stat. 532, the then-current version of the federal officer removal statute. Much of Justice Brandeis' opinion is devoted to determining whether railroad receivers were "officer[s] of the courts of the United States" for purposes of a recent amendment to the removal statute which provided that such an officer could remove to federal court civil or criminal actions against him brought "for or on account of any act done under color of his office or in the performance of his duties as such officer." Cf. 28 U. S. C. § 1442(a)(3). In the course of his examination of the history of Judicial Code § 33, Justice Brandeis concluded that "it applied . . . only when the person defending caused it to appear that his defense was that in doing the acts charged he was doing no more than his duty under those [revenue] laws or orders [of either House of Congress]." 292 U. S., at 33. Applying this understanding to the recent amendment concerning court officers, Justice Brandeis observed that "[t]he defendant receiver does not justify under any judgment or order of a federal court. Nor does the suit

present otherwise any federal question. Its only relation to the federal law is that the receiver sued was appointed by a federal court . . . ." *Id.*, at 34. This, "in harmony with the trend of legislation providing that the federal character of the litigant should not alone confer jurisdiction upon a federal court," *id.*, at 35, was not enough to sustain the receiver's petition for removal. "The receiver here sued, although an officer of the court operating the railroad pursuant to the order appointing him, is not an officer engaged in enforcing an order of a court. . . . Nor is there reason to assume that he will in this case rest his defense on his duty to cause the train to be operated." *Id.*, at 39.

Finally, the Government relies on *Maryland* v. *Soper (No. 1)*, 270 U. S. 9 (1926), a decision in which we rejected the removal petitions of federal officers. This prohibition era decision involved prohibition agents charged with murder and rejected the federal officers' removal petitions on the grounds that the averments in the petitions themselves were "not sufficiently informing and specific to make a case for removal . . . ." *Id.*, at 34. In *Soper (No. 1)*, unlike any prior removal case we had adjudicated, the prohibition agents were only able to assert that they neither committed nor had any knowledge of the murder for which they were charged. They had simply come upon a wounded and dying man in the vicinity of an illegal still which they had destroyed after unsuccessfully giving chase to bootleggers. While rejecting the agents' petition as "not sufficiently informing," *ibid.*, Chief Justice Taft also rejected Maryland's contention that a federal officer can successfully remove a criminal prosecution only "by admitting that he did the act for which he is prosecuted." *Id.*, at 32. Rather, the Chief Justice enunciated the following test:

> "There must be a causal connection between what the officer has done under asserted official authority and the state prosecution. It must appear that the prosecution of him, for whatever offense, has arisen out of the acts

done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his not justified by his federal duty. But the statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority. It is enough that his acts or his presence at the place in performance of his official duty constitute the basis, though mistaken or false, of the state prosecution." *Id.*, at 33.

Unlike the Government, we do not understand the causal connection test of *Soper (No. 1)* to have eliminated the general requirement that federal officer removal be predicated on the existence of a federal defense. *Soper (No. 1)* presented a unique criminal prosecution, markedly unlike those before us today, where a federal officer pleaded by traverse and sought removal. While we rejected the removal petition at issue in that case, the decision assumed that a situation could arise in which a petition that pleaded by traverse might warrant removal. Under such circumstances, we suggested that careful pleading, demonstrating the close connection between the state prosecution and the federal officer's performance of his duty, might adequately replace the specific averment of a federal defense. We are not today presented with such a pleading by traverse and need not decide whether removal on the grounds suggested in *Soper (No. 1)* would be permissible under either the statute or the Constitution.

Similarly, we do not understand *Willingham* v. *Morgan*, 395 U. S. 402 (1969), to have been such a case. In *Willingham*, the petitioner sued federal prison officials in state court on state tort law grounds for injuries he allegedly had received while imprisoned. The officials sought removal on official immunity grounds. See *Barr* v. *Matteo*, 360 U. S. 564 (1959); *Howard* v. *Lyons*, 360 U. S. 593, 597 (1959) (the validity of a claim of official immunity to state tort actions "must be judged by federal standards, to be formulated by

the courts in the absence of legislative action by Congress"); see also *Westfall* v. *Erwin*, 484 U. S. 292, 295 (1988). The central question at issue in *Willingham* was whether the defense of official immunity was sufficient to support removal under § 1442(a)(1). We held that the removal statute "is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law. . . . In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court." 395 U. S., at 406–407.

In *Willingham* we adverted to the causal connection test of *Soper (No. 1)*, not as a substitute for the averment of an official immunity defense, but as a means of delimiting the pleading requirements for establishing a colorable defense of that nature. *Id.*, at 409 ("In this case, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required 'causal connection.' The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times"). Despite the Government's suggestion, we decline to divorce the federal official immunity defense from the pleadings required to allege it and transform those pleading requirements into an independent basis for jurisdiction. Mesa and Ebrahim have not and could not present an official immunity defense to the state criminal prosecutions brought against them. *Imbler* v. *Pachtman*, 424 U. S. 409, 429 (1976) ("This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law"). Accordingly, the liberal pleadings sufficient to allege an official immunity defense which we permitted in *Willingham* are inapplicable to removal of the prosecutions before us today.

In sum, an unbroken line of this Court's decisions extending back nearly a century and a quarter have understood all

the various incarnations of the federal officer removal statute to require the averment of a federal defense.

B

In the face of all these decisions, the Government defends the proposition that § 1442(a)(1) permits removal without the assertion of a federal defense. It does so based on the plain language of the removal statute and on the substantial federal interests that would be protected by permitting universal removal of all civil actions and criminal prosecutions brought against any federal official "for the manner in which he has performed his federal duties . . . ." Brief for Petitioners 8.

The critical phrase "under color of office" first appeared in the Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171, and has remained in every version of the removal statute that we have interpreted since we decided *Tennessee* v. *Davis* in 1880. Nevertheless, the Government contends that "under color of office" cannot bear the weight of a federal defense requirement. We agree with the Government that the specialized grants of jurisdiction in the last clause of subsection (1) concerning the apprehension of criminals and the collection of revenue and subsections (2)–(4) of § 1442(a) are largely the "residue" of the pre-1948, more limited removal statutes now entirely encompassed by the general removal provision of the first clause of subsection (1). See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1057 (3d ed. 1988). The Government, however, derives from consideration of subsection (3)—"[a]ny officer of the courts of the United States, for any act under color of office or in the performance of his duties"—support for its argument that the removal statute "is not limited to cases in which the federal employee raises a federal defense." Brief for Petitioners 26. The Government argues that "in the performance of his duties" must mean something besides "under color of office" in subsection

(3). Nonetheless, by hypothesis, the disjunction in subsection (3) means no more than "under color of such office" in subsection (1). Therefore, the Government concludes, the controlling provision in subsection (1) must be construed broadly to permit removal of any civil actions or criminal prosecutions brought against a federal officer for acts done during the performance of his duties regardless of whether that officer raises a federal defense.

The court officers provision of subsection (3) was added to Judicial Code § 33—the removal statute superseded by the 1948 enactment—by the Act of August 23, 1916, ch. 399, 39 Stat. 532. We considered this provision in *Gay* v. *Ruff*, and explicitly rejected the argument the United States makes today. First, we recognized that the purpose of the 1916 amendment was "'to extend the provisions of section 33 uniformly to officers of the courts of the United States, not only in cases arising under the revenue laws, but in all cases, giving to them the same protection in all cases now given to officers acting under the revenue laws, and to officers of Congress.'" 292 U. S., at 38, quoting H. R. Rep. 776, 64th Cong., 1st Sess., 2 (1916). Second, we also recognized that "[t]here is no expression in the Act of 1916, or in the proceedings which led to its enactment, of an intention to repeal any existing law or to depart from the long-existing policy of restricting the federal jurisdiction." 292 U. S., at 37. Third, as discussed earlier, we noted that the "existing law" which "restrict[ed] the federal jurisdiction" was precisely the requirement that the federal officer predicate removal on the averment of a federal defense. *Id.*, at 33–35, 39; see also *supra*, at 130–131. Accordingly, we concluded that "in the performance of his duties" meant no more than "under color of office," and that Congress meant by both expressions to preserve the pre-existing requirement of a federal defense for removal. Again, we see no reason to depart from this longstanding interpretation of Congress' intent in enacting the removal statute.

C

The Government's view, which would eliminate the federal defense requirement, raises serious doubt whether, in enacting § 1442(a), Congress would not have "expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 491 (1983). In *Verlinden*, we discussed the distinction between "jurisdictional statutes" and "the federal law under which [an] action arises, for Art. III purposes," and recognized that pure jurisdictional statutes which seek "to do nothing more than grant jurisdiction over a particular class of cases" cannot support Art. III "arising under" jurisdiction.* *Id.*, at 496, citing *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 451–543 (1852); *Mossman* v. *Higginson*, 4 Dall. 12 (1800). In *Verlinden* we held that the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. § 1330, is a "comprehensive scheme" comprising both pure jurisdictional provisions and federal law capable of supporting Art. III "arising under" jurisidiction. 461 U. S., at 496.

Section 1442(a), in our view, is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III "arising under" jurisdiction. Rather, it is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes. The removal statute itself merely serves to overcome the "well-pleaded complaint" rule which would otherwise preclude removal even if a federal defense were alleged. See *Verlinden*, *supra*, at 494; *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U. S. 804, 808

*The "Arising Under" Clause provides: "The judicial Power [of the United States] shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U. S. Const., Art. III, § 2, cl. 1.

(1986) (under the "well-pleaded complaint" rule "[a] defense that raises a federal question is inadequate to confer federal jurisdiction"); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149 (1908). Adopting the Government's view would eliminate the substantive Art. III foundation of § 1442(a)(1) and unnecessarily present grave constitutional problems. We are not inclined to abandon a longstanding reading of the officer removal statute that clearly preserves its constitutionality and adopt one which raises serious constitutional doubt. See *Califano* v. *Yamasaki*, 442 U. S. 682, 693 (1979) ("[I]f 'a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided,' *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932), a court should adopt that construction") (brackets in original).

At oral argument the Government urged upon us a theory of "protective jurisdiction" to avoid these Art. III difficulties. Tr. of Oral Arg. 6. In *Willingham*, we recognized that Congress' enactment of federal officer removal statutes since 1815 served "to provide a federal forum for cases where federal officials must raise defenses arising from their official duties . . . [and] to protect federal officers from interference by hostile state courts." 395 U. S., at 405. The Government insists that the full protection of federal officers from interference by hostile state courts cannot be achieved if the averment of a federal defense must be a predicate to removal. More important, the Government suggests that this generalized congressional interest in protecting federal officers from state court interference suffices to support Art. III "arising under" jurisdiction.

We have, in the past, not found the need to adopt a theory of "protective jurisdiction" to support Art. III "arising under" jurisdiction, *Verlinden*, *supra*, at 491, n. 17, and we do not see any need for doing so here because we do not recognize any federal interests that are not protected by limiting removal to situations in which a federal defense is alleged. In these prosecutions, no state court hostility or interference

has even been alleged by petitioners and we can discern no federal interest in potentially forcing local district attorneys to choose between prosecuting traffic violations hundreds of miles from the municipality in which the violations occurred or abandoning those prosecutions.

The Santa Clara County Municipal Court, as it happens, is located in San Jose, as is a Federal District Court of the Northern District of California. As California observes, however, other of its county seats may be located up to 350 miles from the nearest Federal District Court. Brief for Respondent 47, n. 25. In other of our Nation's large but less populous States the distances and accompanying burdens on state prosecutors may be even more acute. For example, the distance from Barrow, Alaska, the seat of that State's Second Judicial District, to Nome, where the nearest Federal District Court sits, is over 500 miles. We have emphasized:

> "[U]nder our federal system, it goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government. Because the regulation of crime is pre-eminently a matter for the States, we have identified a strong judicial policy against federal interference with state criminal proceedings." *Arizona* v. *Manypenny*, 451 U. S. 232, 243 (1981) (citations and internal quotations omitted).

It is hardly consistent with this "strong judicial policy" to permit removal of state criminal prosecutions of federal officers and thereby impose potentially extraordinary burdens on the States when absolutely no federal question is even at issue in such prosecutions. We are simply unwilling to credit the Government's ominous intimations of hostile state prosecutors and collaborationist state courts interfering with federal officers by charging them with traffic violations and other crimes for which they would have no federal defense in immunity or otherwise. That is certainly not the case in the prosecutions of Mesa and Ebrahim, nor was it the case in the removal of the state prosecutions of federal revenue agents

that confronted us in our early decisions. In those cases where true state hostility may have existed, it was specifically directed against federal officers' efforts to carry out their federally mandated duties. *E. g.*, *Tennessee* v. *Davis*, 100 U. S. 257 (1880). As we said in *Maryland* v. *Soper (No. 2)*, 270 U. S., at 43–44, with respect to Judicial Code § 33:

> "In answer to the suggestion that our construction of § 33 and our failure to sustain the right of removal in the case before us will permit evilly minded persons to evade the useful operations of § 33, we can only say that, if prosecutions of this kind come to be used to obstruct seriously the enforcement of federal laws, it will be for Congress in its discretion to amend § 33 so that the words . . . shall be enlarged to mean that any prosecution of a federal officer for any state offense which can be shown by evidence to have had its motive in a wish to hinder him in the enforcement of federal law, may be removed for trial to the proper federal court. We are not now considering or intimating whether such an enlargement would be valid; but what we wish to be understood as deciding is that the present language of § 33 can not be broadened by fair construction to give it such a meaning. These were not prosecutions, therefore, commenced on account of acts done by these defendants solely in pursuance of their federal authority. With the statute as it is, they can not have the protection of a trial in the federal court . . . ."

Chief Justice Taft's words of 63 years ago apply equally well today; the present language of § 1442(a) cannot be broadened by fair construction to give it the meaning which the Government seeks. Federal officer removal under 28 U. S. C. § 1442(a) must be predicated upon averment of a federal defense. Accordingly, the judgment of the Court of Appeals is affirmed.

So ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

While I concur in the judgment and opinion of the Court, I write separately to emphasize a point that might otherwise be overlooked. In most routine traffic-accident cases like those presented here, no significant federal interest is served by removal; it is, accordingly, difficult to believe that Congress would have intended the statute to reach so far. It is not at all inconceivable, however, that Congress' concern about local hostility to federal authority could come into play in some circumstances where the federal officer is unable to present any "federal defense." The days of widespread resistance by state and local governmental authorities to Acts of Congress and to decisions of this Court in the areas of school desegregation and voting rights are not so distant that we should be oblivious to the possibility of harassment of federal agents by local law enforcement authorities. Such harassment could well take the form of unjustified prosecution for traffic or other offenses, to which the federal officer would have no immunity or other federal defense. The removal statute, it would seem to me, might well have been intended to apply in such unfortunate and exceptional circumstances.

The Court today rightly refrains from deciding whether removal in such a situation is possible, since that is not the case before us. But the Court leaves open the possibility that where a federal officer is prosecuted because of local hostility to his function, "careful pleading, demonstrating the close connection between the state prosecution and the federal officer's performance of his duty, might adequately replace the specific averment of a federal defense." *Ante*, at 132. With the understanding that today's decision does not foreclose the possibility of removal in such circumstances even in the absence of a federal defense, I join the Court's opinion.

BONITO BOATS, INC. *v.* THUNDER CRAFT BOATS, INC.

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 87–1346. Argued December 5, 1988—Decided February 21, 1989

Petitioner developed a hull design for a fiberglass recreational boat that it marketed under the trade name Bonito Boat Model 5VBR. The manufacturing process involved creating a hardwood model that was then sprayed with fiberglass to create a mold. The mold then served to produce the finished fiberglass boats for sale. No patent application was filed to protect the utilitarian or design aspects of the hull or the manufacturing process by which the finished boats were produced. After the Bonito 5VBR had been on the market for six years, the Florida Legislature enacted a statute that prohibits the use of a direct molding process to duplicate unpatented boat hulls, and forbids the knowing sale of hulls so duplicated. Petitioner subsequently filed an action in a Florida Circuit Court, alleging that respondent had violated the statute by using the direct molding process to duplicate the Bonito 5VBR fiberglass hull and by knowingly selling such duplicates. Petitioner sought damages, injunctive relief, and an award of attorney's fees under the Florida law. The trial court granted respondent's motion to dismiss the complaint on the ground that the statute conflicted with federal patent law and was therefore invalid under the Supremacy Clause of the Federal Constitution. The Florida Court of Appeals and the Florida Supreme Court affirmed.

Held: The Florida statute is pre-empted by the Supremacy Clause. Pp. 146–168.

(a) This Court's decisions have made clear that state regulation of intellectual property must yield to the extent that it clashes with the federal patent statute's balance between public right and private monopoly designed to promote certain creative activity. The efficient operation of the federal patent system depends upon substantially free trade in publicly known, unpatented design and utilitarian conceptions. *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225; *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234. A state law that interferes with the enjoyment of such a conception contravenes the ultimate goal of public disclosure and use that is the centerpiece of federal patent policy. Moreover, through the creation of patent-like rights, the States could essentially redirect inventive efforts away from the careful criteria of patentability developed by Congress over the last 200 years. Pp. 146–157.

(b) By offering patent-like protection for ideas deemed unprotected under the federal patent scheme, the Florida statute conflicts with the "strong federal policy favoring free competition in ideas which do not merit patent protection." *Lear, Inc.* v. *Adkins*, 395 U. S. 653, 656. The Florida statute does not prohibit "unfair competition" in the usual sense of that term, but rather is aimed at promoting inventive effort by preventing the efficient exploitation of the design and utilitarian conceptions embodied in the product itself. It endows the original boat manufacturer with rights against the world, similar in scope and operation to the rights accorded the federal patentee. This protection is made available for an unlimited number of years to all boat hulls and their component parts. Protection is available for subject matter for which patent protection has been denied or has expired, as well as for designs which have been freely revealed to the consuming public by their creators. In this case, the statute operates to allow petitioner to assert a substantial property right in a design idea which has already been available to the public for over six years. Pp. 157–160.

(c) That the Florida statute does not restrict all means of reproduction does not eliminate the conflict with the federal patent scheme. In essence, the statute grants the original manufacturer the right to prohibit a form of reverse engineering of a product in general circulation. This is one of the rights granted to the federal patent holder, but has never been part of state protection under the law of unfair competition or trade secrets. The study and recomposition of unpatented articles available to the public at large may lead to significant advances in technology and design. Moreover, the threat of reverse engineering of unpatented articles creates a significant spur to the achievement of the rigorous standards of patentability established by Congress. By substantially altering this competitive reality, the Florida statute and similar state laws may erect themselves as substantial competitors to the federal patent scheme. Such a result would contravene the congressional intent to create a uniform system for determining the boundaries of public and private right in utilitarian and design ideas. *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U. S. 470, distinguished. Pp. 160–165.

(d) The Patent and Copyright Clauses of the Federal Constitution do not by their own force, or by negative implication, deprive the States of the power to adopt rules to promote intellectual creation within their own jurisdictions where Congress has left the field free of federal regulation. *Goldstein* v. *California*, 412 U. S. 546. Even as to design and utilitarian conceptions within the subject matter of the patent laws, the States may place limited regulations on the exploitation of unpatented ideas to prevent consumer confusion as to source or the tortious appropriation of trade secrets. Both the law of unfair competition and state trade secret law have coexisted harmoniously with federal patent protec-

tion for almost 200 years, and Congress has demonstrated its full awareness of the operation of state law in these areas without any indication of disapproval. *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238. The same cannot be said of the Florida scheme at issue here, where Congress has explicitly considered the need for additional protections for industrial designs and declined to act. By according patent-like protection to the otherwise unprotected design and utilitarian aspects of products in general circulation, the Florida statute enters a field of regulation which the patent laws have reserved to Congress and is therefore pre-empted by the Supremacy Clause of the Federal Constitution. Pp. 165–168.

515 So. 2d 220, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Tomas Morgan Russell argued the cause for petitioner. With him on the briefs were *Granger Cook, Jr.*, and *John S. Schoene.*

Charles E. Lipsey, by appointment of the Court, 487 U. S. 1231, argued the cause as *amicus curiae* in support of the judgment below. With him on the brief was *Donald R. Dunner.**

JUSTICE O'CONNOR delivered the opinion of the Court.

We must decide today what limits the operation of the federal patent system places on the States' ability to offer substantial protection to utilitarian and design ideas which the patent laws leave otherwise unprotected. In *Interpart*

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*Briefs of *amici curiae* urging reversal were filed for Boston Whaler, Inc., by *Geoffrey S. Stewart, James L. Quarles III*, and *William F. Lee;* for Intellectual Property Owners, Inc., by *Donald W. Banner* and *Herbert C. Wamsley;* for the Marine Industries Association of South Florida et al. by *Julius F. Parker, Jr., Jack M. Skelding, Jr., James W. York*, Deputy Attorney General of Florida, and *Robert A. Butterworth*, Attorney General, *pro se;* and for the Orange County Patent Law Association et al. by *Randall Glenn Wick* and *J. Thomas McCarthy.*

Briefs of *amici curiae* urging affirmance were filed for the Aftermarket Body Parts Association et al. by *James F. Fitzpatrick, Melvin C. Garbow*, and *Peter T. Grossi, Jr.;* for the Certified Automobile Parts Association by Messrs. *Garbow* and *Fitzpatrick;* and for Xenetics Biomedical, Inc., by *Edward S. Irons.*

Alex Devience, Jr., filed a brief for Imos Italia and Torino Industries, Ltd., as *amicus curiae.*

Corp. v. *Italia*, 777 F. 2d 678 (1985), the Court of Appeals for the Federal Circuit concluded that a California law prohibiting the use of the "direct molding process" to duplicate unpatented articles posed no threat to the policies behind the federal patent laws. In this case, the Florida Supreme Court came to a contrary conclusion. It struck down a Florida statute which prohibits the use of the direct molding process to duplicate unpatented boat hulls, finding that the protection offered by the Florida law conflicted with the balance struck by Congress in the federal patent statute between the encouragement of invention and free competition in unpatented ideas. 515 So. 2d 220 (1987). We granted certiorari to resolve the conflict, 486 U. S. 1004 (1988), and we now affirm the judgment of the Florida Supreme Court.

I

In September 1976, petitioner Bonito Boats, Inc. (Bonito), a Florida corporation, developed a hull design for a fiberglass recreational boat which it marketed under the trade name Bonito Boat Model 5VBR. App. 5. Designing the boat hull required substantial effort on the part of Bonito. A set of engineering drawings was prepared, from which a hardwood model was created. The hardwood model was then sprayed with fiberglass to create a mold, which then served to produce the finished fiberglass boats for sale. The 5VBR was placed on the market sometime in September 1976. There is no indication in the record that a patent application was ever filed for protection of the utilitarian or design aspects of the hull, or for the process by which the hull was manufactured. The 5VBR was favorably received by the boating public, and "a broad interstate market" developed for its sale. *Ibid.*

In May 1983, after the Bonito 5VBR had been available to the public for over six years, the Florida Legislature enacted Fla. Stat. § 559.94 (1987). The statute makes "[i]t . . . unlawful for any person to use the direct molding process to du-

plicate for the purpose of sale any manufactured vessel hull or component part of a vessel made by another without the written permission of that other person." § 559.94(2). The statute also makes it unlawful for a person to "knowingly sell a vessel hull or component part of a vessel duplicated in violation of subsection (2)." § 559.94(3). Damages, injunctive relief, and attorney's fees are made available to "[a]ny person who suffers injury or damage as the result of a violation" of the statute. § 559.94(4). The statute was made applicable to vessel hulls or component parts duplicated through the use of direct molding after July 1, 1983. § 559.94(5).

On December 21, 1984, Bonito filed this action in the Circuit Court of Orange County, Florida. The complaint alleged that respondent here, Thunder Craft Boats, Inc. (Thunder Craft), a Tennessee corporation, had violated the Florida statute by using the direct molding process to duplicate the Bonito 5VBR fiberglass hull, and had knowingly sold such duplicates in violation of the Florida statute. Bonito sought "a temporary and permanent injunction prohibiting [Thunder Craft] from continuing to unlawfully duplicate and sell Bonito Boat hulls or components," as well as an accounting of profits, treble damages, punitive damages, and attorney's fees. App. 6, 7. Respondent filed a motion to dismiss the complaint, arguing that under this Court's decisions in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225 (1964), and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234 (1964), the Florida statute conflicted with federal patent law and was therefore invalid under the Supremacy Clause of the Federal Constitution. App. 8–9. The trial court granted respondent's motion, *id.*, at 10–11, and a divided Court of Appeals affirmed the dismissal of petitioner's complaint. 487 So. 2d 395 (1986).

On appeal, a sharply divided Florida Supreme Court agreed with the lower courts' conclusion that the Florida law impermissibly interfered with the scheme established by the federal patent laws. See 515 So. 2d 220 (1987). The major-

ity read our decisions in *Sears* and *Compco* for the proposition that "when an article is introduced into the public domain, only a patent can eliminate the inherent risk of competition and then but for a limited time." 515 So. 2d, at 222. Relying on the Federal Circuit's decision in the *Interpart* case, the three dissenting judges argued that the Florida antidirect molding provision "does not prohibit the copying of an unpatented item. It prohibits one method of copying; the item remains in the public domain." 515 So. 2d, at 223 (Shaw, J., dissenting).

II

Article I, § 8, cl. 8, of the Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the "Progress of Science and useful Arts." As we have noted in the past, the Clause contains both a grant of power and certain limitations upon the exercise of that power. Congress may not create patent monopolies of unlimited duration, nor may it "authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available." *Graham* v. *John Deere Co. of Kansas City*, 383 U. S. 1, 6 (1966).

From their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy. Soon after the adoption of the Constitution, the First Congress enacted the Patent Act of 1790, which allowed the grant of a limited monopoly of 14 years to any applicant that "hath . . . invented or discov-

ered any useful art, manufacture, . . . or device, or any improvement therein not before known or used." 1 Stat. 109, 110. In addition to novelty, the 1790 Act required that the invention be "sufficiently useful and important" to merit the 14-year right of exclusion. *Ibid.* Section 2 of the Act required that the patentee deposit with the Secretary of State, a specification and if possible a model of the new invention, "which specification shall be so particular, and said models so exact, as not only to distinguish the invention or discovery from other things before known and used, but also to enable a workman or other person skilled in the art or manufacture . . . to make, construct, or use the same, to the end that the public may have the full benefit thereof, after the expiration of the patent term." *Ibid.*

The first Patent Act established an agency known by self-designation as the "Commissioners for the promotion of Useful Arts," composed of the Secretary of State, the Secretary of the Department of War, and the Attorney General, any two of whom could grant a patent. Thomas Jefferson was the first Secretary of State, and the driving force behind early federal patent policy. For Jefferson, a central tenet of the patent system in a free market economy was that "a machine of which we were possessed, might be applied by every man to any use of which it is susceptible." 13 Writings of Thomas Jefferson 335 (Memorial ed. 1904). He viewed a grant of patent rights in an idea already disclosed to the public as akin to an *ex post facto* law, "obstruct[ing] others in the use of what they possessed before." *Id.*, at 326–327. Jefferson also played a large role in the drafting of our Nation's second Patent Act, which became law in 1793. The Patent Act of 1793 carried over the requirement that the subject of a patent application be "not known or used before the application." Ch. 11, 1 Stat. 318, 319. A defense to an infringement action was created where "the thing, thus secured by patent, was not originally discovered by the patentee, but had been in use, or had been described in some public work

anterior to the supposed discovery of the patentee." *Id.*, at 322. Thus, from the outset, federal patent law has been about the difficult business "of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not." 13 Writings of Thomas Jefferson, *supra*, at 335.

Today's patent statute is remarkably similar to the law as known to Jefferson in 1793. Protection is offered to "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U. S. C. § 101. Since 1842, Congress has also made protection available for "any new, original and ornamental design for an article of manufacture." 35 U. S. C. § 171. To qualify for protection, a design must present an aesthetically pleasing appearance that is not dictated by function alone, and must satisfy the other criteria of patentability. The novelty requirement of patentability is presently expressed in 35 U. S. C. §§ 102(a) and (b), which provide:

> "A person shall be entitled to a patent unless—
>
> "(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
>
> "(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country more than one year prior to the date of application for patent in the United States . . . ."

Sections 102(a) and (b) operate in tandem to exclude from consideration for patent protection knowledge that is already available to the public. They express a congressional determination that the creation of a monopoly in such information would not only serve no socially useful purpose, but would in fact injure the public by removing existing knowledge from public use. From the Patent Act of 1790 to the present day,

the public sale of an unpatented article has acted as a complete bar to federal protection of the idea embodied in the article thus placed in public commerce.

In the case of *Pennock* v. *Dialogue*, 2 Pet. 1 (1829), Justice Story applied these principles under the patent law of 1800. The patentee had developed a new technique for the manufacture of rubber hose for the conveyance of air and fluids. The invention was reduced to practice in 1811, but letters patent were not sought and granted until 1818. In the interval, the patentee had licensed a third party to market the hose, and over 13,000 feet of the new product had been sold in the city of Philadelphia alone. The Court concluded that the patent was invalid due to the prior public sale, indicating that, "if [an inventor] suffers the thing he invented to go into public use, or to be publicly sold for use" "[h]is voluntary act or acquiescence in the public sale and use is an abandonment of his right." *Id.*, at 23–24. The Court noted that under the common law of England, letters patent were unavailable for the protection of articles in public commerce at the time of the application, *id.*, at 20, and that this same doctrine was immediately embodied in the first patent laws passed in this country. *Id.*, at 21–22.

As the holding of *Pennock* makes clear, the federal patent scheme creates a limited opportunity to obtain a property right in an idea. Once an inventor has decided to lift the veil of secrecy from his work, he must choose the protection of a federal patent or the dedication of his idea to the public at large. As Judge Learned Hand once put it: "[I]t is a condition upon the inventor's right to a patent that he shall not exploit his discovery competitively after it is ready for patenting; he must content himself with either secrecy or legal monopoly." *Metallizing Engineering Co.* v. *Kenyon Bearing & Auto Parts Co.*, 153 F. 2d 516, 520 (CA2), cert. denied, 328 U. S. 840 (1946).

In addition to the requirements of novelty and utility, the federal patent law has long required that an innovation not be

anticipated by the prior art in the field. Even if a particular combination of elements is "novel" in the literal sense of the term, it will not qualify for federal patent protection if its contours are so traced by the existing technology in the field that the "improvement is the work of the skillful mechanic, not that of the inventor." *Hotchkiss* v. *Greenwood*, 11 How. 248, 267 (1851). In 1952, Congress codified this judicially developed requirement in 35 U. S. C. § 103, which refuses protection to new developments where "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person of ordinary skill in the art to which said subject matter pertains." The nonobviousness requirement extends the field of unpatentable material beyond that which is known to the public under § 102, to include that which could readily be deduced from publicly available material by a person of ordinary skill in the pertinent field of endeavor. See *Graham*, 383 U. S., at 15. Taken together, the novelty and nonobviousness requirements express a congressional determination that the purposes behind the Patent Clause are best served by free competition and exploitation of either that which is already available to the public or that which may be readily discerned from publicly available material. See *Aronson* v. *Quick Point Pencil Co.*, 440 U. S. 257, 262 (1979) ("[T]he stringent requirements for patent protection seek to ensure that ideas in the public domain remain there for the use of the public").

The applicant whose invention satisfies the requirements of novelty, nonobviousness, and utility, and who is willing to reveal to the public the substance of his discovery and "the best mode . . . of carrying out his invention," 35 U. S. C. § 112, is granted "the right to exclude others from making, using, or selling the invention throughout the United States," for a period of 17 years. 35 U. S. C. § 154. The federal patent system thus embodies a carefully crafted bargain for en-

couraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years. "[The inventor] may keep his invention secret and reap its fruits indefinitely. In consideration of its disclosure and the consequent benefit to the community, the patent is granted. An exclusive enjoyment is guaranteed him for seventeen years, but upon expiration of that period, the knowledge of the invention inures to the people, who are thus enabled without restriction to practice it and profit by its use." *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 186–187 (1933).

The attractiveness of such a bargain, and its effectiveness in inducing creative effort and disclosure of the results of that effort, depend almost entirely on a backdrop of free competition in the exploitation of unpatented designs and innovations. The novelty and nonobviousness requirements of patentability embody a congressional understanding, implicit in the Patent Clause itself, that free exploitation of ideas will be the rule, to which the protection of a federal patent is the exception. Moreover, the ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure. State law protection for techniques and designs whose disclosure has already been induced by market rewards may conflict with the very purpose of the patent laws by decreasing the range of ideas available as the building blocks of further innovation. The offer of federal protection from competitive exploitation of intellectual property would be rendered meaningless in a world where substantially similar state law protections were readily available. To a limited extent, the federal patent laws must determine not only what is protected, but also what is free for all to use. Cf. *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U. S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regu-

lated, and in that event would have as much pre-emptive force as a decision *to* regulate") (emphasis in original).

Thus our past decisions have made clear that state regulation of intellectual property must yield to the extent that it clashes with the balance struck by Congress in our patent laws. The tension between the desire to freely exploit the full potential of our inventive resources and the need to create an incentive to deploy those resources is constant. Where it is clear how the patent laws strike that balance in a particular circumstance, that is not a judgment the States may second-guess. We have long held that after the expiration of a federal patent, the subject matter of the patent passes to the free use of the public as a matter of federal law. See *Coats* v. *Merrick Thread Co.*, 149 U. S. 562, 572 (1893) ("[P]laintiffs' right to the use of the embossed periphery expired with their patent, and the public had the same right to make use of it as if it had never been patented"); *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111 (1938); *Singer Mfg. Co.* v. *June Mfg. Co.*, 163 U. S. 169 (1896). Where the public has paid the congressionally mandated price for disclosure, the States may not render the exchange fruitless by offering patent-like protection to the subject matter of the expired patent. "It is self-evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property." *Singer*, *supra*, at 185.

In our decisions in *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225 (1964), and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234 (1964), we found that publicly known design and utilitarian ideas which were unprotected by patent occupied much the same position as the subject matter of an expired patent. The *Sears* case involved a pole lamp originally designed by the plaintiff Stiffel, who had secured both design and mechanical patents on the lamp. Sears purchased unauthorized copies of the lamps, and was able to sell them at a retail price practically equivalent to the wholesale

price of the original manufacturer. *Sears*, *supra*, at 226. Stiffel brought an action against Sears in Federal District Court, alleging infringement of the two federal patents and unfair competition under Illinois law. The District Court found that Stiffel's patents were invalid due to anticipation in the prior art, but nonetheless enjoined Sears from further sales of the duplicate lamps based on a finding of consumer confusion under the Illinois law of unfair competition. The Court of Appeals affirmed, coming to the conclusion that the Illinois law of unfair competition prohibited product simulation even in the absence of evidence that the defendant took some further action to induce confusion as to source.

This Court reversed, finding that the unlimited protection against copying which the Illinois law accorded an unpatentable item whose design had been fully disclosed through public sales conflicted with the federal policy embodied in the patent laws. The Court stated:

> "In the present case the 'pole lamp' sold by Stiffel has been held not to be entitled to the protection of either a mechanical or a design patent. An unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so. What Sears did was to copy Stiffel's design and sell lamps almost identical to those sold by Stiffel. This it had every right to do under the federal patent laws." 376 U. S., at 231.

A similar conclusion was reached in *Compco*, where the District Court had extended the protection of Illinois' unfair competition law to the functional aspects of an unpatented fluorescent lighting system. The injunction against copying of an unpatented article, freely available to the public, impermissibly "interfere[d] with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain." *Compco*, *supra*, at 237.

The pre-emptive sweep of our decisions in *Sears* and *Compco* has been the subject of heated scholarly and judicial debate. See, *e. g.*, Symposium, Product Simulation: A Right or a Wrong?, 64 Colum. L. Rev. 1178 (1964); *Lear, Inc.* v. *Adkins*, 395 U. S. 653, 676 (1969) (Black, J., concurring in part and dissenting in part). Read at their highest level of generality, the two decisions could be taken to stand for the proposition that the States are completely disabled from offering any form of protection to articles or processes which fall within the broad scope of patentable subject matter. See *id.*, at 677. Since the potentially patentable includes "anything under the sun that is made by man," *Diamond* v. *Chakrabarty*, 447 U. S. 303, 309 (1980) (citation omitted), the broadest reading of *Sears* would prohibit the States from regulating the deceptive simulation of trade dress or the tortious appropriation of private information.

That the extrapolation of such a broad pre-emptive principle from *Sears* is inappropriate is clear from the balance struck in *Sears* itself. The *Sears* Court made it plain that the States "may protect businesses in the use of their trademarks, labels, or distinctive dress in the packaging of goods so as to prevent others, by imitating such markings, from misleading purchasers as to the source of the goods." *Sears*, *supra*, at 232 (footnote omitted). Trade dress is, of course, potentially the subject matter of design patents. See *W. T. Rogers Co.* v. *Keene*, 778 F. 2d 334, 337 (CA7 1985). Yet our decision in *Sears* clearly indicates that the States may place limited regulations on the circumstances in which such designs are used in order to prevent consumer confusion as to source. Thus, while *Sears* speaks in absolutist terms, its conclusion that the States may place some conditions on the use of trade dress indicates an implicit recognition that all state regulation of potentially patentable but unpatented subject matter is not *ipso facto* pre-empted by the federal patent laws.

What was implicit in our decision in *Sears*, we have made explicit in our subsequent decisions concerning the scope of federal pre-emption of state regulation of the subject matter of patent. Thus, in *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U. S. 470 (1974), we held that state protection of trade secrets did not operate to frustrate the achievement of the congressional objectives served by the patent laws. Despite the fact that state law protection was available for ideas which clearly fell within the subject matter of patent, the Court concluded that the nature and degree of state protection did not conflict with the federal policies of encouragement of patentable invention and the prompt disclosure of such innovations.

Several factors were critical to this conclusion. First, because the public awareness of a trade secret is by definition limited, the Court noted that "the policy that matter once in the public domain must remain in the public domain is not incompatible with the existence of trade secret protection." *Id.*, at 484. Second, the *Kewanee* Court emphasized that "[t]rade secret law provides far weaker protection in many respects than the patent law." *Id.*, at 489–490. This point was central to the Court's conclusion that trade secret protection did not conflict with either the encouragement or disclosure policies of the federal patent law. The public at large remained free to discover and exploit the trade secret through reverse engineering of products in the public domain or by independent creation. *Id.*, at 490. Thus, the possibility that trade secret protection would divert inventors from the creative effort necessary to satisfy the rigorous demands of patent protection was remote indeed. *Ibid.* Finally, certain aspects of trade secret law operated to protect noneconomic interests outside the sphere of congressional concern in the patent laws. As the Court noted, "[A] most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable." *Id.*, at 487 (footnote omitted). There was no indication that Con-

gress had considered this interest in the balance struck by the patent laws, or that state protection for it would interfere with the policies behind the patent system.

We have since reaffirmed the pragmatic approach which *Kewanee* takes to the pre-emption of state laws dealing with the protection of intellectual property. See *Aronson*, 440 U. S., at 262 ("State law is not displaced merely because the contract relates to intellectual property which may or may not be patentable; the states are free to regulate the use of such intellectual property in any manner not inconsistent with federal law"). At the same time, we have consistently reiterated the teaching of *Sears* and *Compco* that ideas once placed before the public without the protection of a valid patent are subject to appropriation without significant restraint. *Aronson*, *supra*, at 263.

At the heart of *Sears* and *Compco* is the conclusion that the efficient operation of the federal patent system depends upon substantially free trade in publicly known, unpatented design and utilitarian conceptions. In *Sears*, the state law offered "the equivalent of a patent monopoly," 376 U. S., at 233, in the functional aspects of a product which had been placed in public commerce absent the protection of a valid patent. While, as noted above, our decisions since *Sears* have taken a decidedly less rigid view of the scope of federal pre-emption under the patent laws, *e. g.*, *Kewanee*, *supra*, at 479–480, we believe that the *Sears* Court correctly concluded that the States may not offer patent-like protection to intellectual creations which would otherwise remain unprotected as a matter of federal law. Both the novelty and the nonobviousness requirements of federal patent law are grounded in the notion that concepts within the public grasp, or those so obvious that they readily could be, are the tools of creation available to all. They provide the baseline of free competition upon which the patent system's incentive to creative effort depends. A state law that substantially interferes with the enjoyment of an unpatented utilitarian or design conception

which has been freely disclosed by its author to the public at large impermissibly contravenes the ultimate goal of public disclosure and use which is the centerpiece of federal patent policy. Moreover, through the creation of patent-like rights, the States could essentially redirect inventive efforts away from the careful criteria of patentability developed by Congress over the last 200 years. We understand this to be the reasoning at the core of our decisions in *Sears* and *Compco*, and we reaffirm that reasoning today.

III

We believe that the Florida statute at issue in this case so substantially impedes the public use of the otherwise unprotected design and utilitarian ideas embodied in unpatented boat hulls as to run afoul of the teaching of our decisions in *Sears* and *Compco*. It is readily apparent that the Florida statute does not operate to prohibit "unfair competition" in the usual sense that the term is understood. The law of unfair competition has its roots in the common-law tort of deceit: its general concern is with protecting *consumers* from confusion as to source. While that concern may result in the creation of "quasi-property rights" in communicative symbols, the focus is on the protection of consumers, not the protection of producers as an incentive to product innovation. Judge Hand captured the distinction well in *Crescent Tool Co.* v. *Kilborn & Bishop Co.*, 247 F. 299, 301 (CA2 1917), where he wrote:

> "[T]he plaintiff has the right not to lose his customers through false representations that those are his wares which in fact are not, but he may not monopolize any design or pattern, however trifling. The defendant, on the other hand, may copy plaintiff's goods slavishly down to the minutest detail: but he may not represent himself as the plaintiff in their sale."

With some notable exceptions, including the interpretation of the Illinois law of unfair competition at issue in *Sears* and

Compco, see *Sears*, *supra*, at 227–228, n. 2, the common-law tort of unfair competition has been limited to protection against copying of nonfunctional aspects of consumer products which have acquired secondary meaning such that they operate as a designation of source. See generally P. Kaufmann, Passing Off and Misappropriation, in 9 International Review of Industrial Property and Copyright Law, Studies in Industrial Property and Copyright Law 100–109 (1986). The "protection" granted a particular design under the law of unfair competition is thus limited to one context where consumer confusion is likely to result; the design "idea" itself may be freely exploited in all other contexts.

In contrast to the operation of unfair competition law, the Florida statute is aimed directly at preventing the exploitation of the design and utilitarian conceptions embodied in the product itself. The sparse legislative history surrounding its enactment indicates that it was intended to create an inducement for the improvement of boat hull designs. See Tr. of Meeting of Transportation Committee, Florida House of Representatives, May 3, 1983, reprinted at App. 22 ("[T]here is no inducement for [a] quality boat manufacturer to improve these designs and secondly, if he does, it is immediately copied. This would prevent that and allow him recourse in circuit court"). To accomplish this goal, the Florida statute endows the original boat hull manufacturer with rights against the world, similar in scope and operation to the rights accorded a federal patentee. Like the patentee, the beneficiary of the Florida statute may prevent a competitor from "making" the product in what is evidently the most efficient manner available and from "selling" the product when it is produced in that fashion. Compare 35 U. S. C. § 154.*

*In some respects, the protection accorded by the Florida statute resembles that of a so-called "product-by-process" patent. Such a claim "is one in which the product is defined at least in part in terms of the method or process by which it is made." D. Chisum, Patents § 8.05, p. 8–67 (1988). As long as the end product of the process is adequately defined

The Florida scheme offers this protection for an unlimited number of years to all boat hulls and their component parts, without regard to their ornamental or technological merit. Protection is available for subject matter for which patent protection has been denied or has expired, as well as for designs which have been freely revealed to the consuming public by their creators.

In this case, the Bonito 5VBR fiberglass hull has been freely exposed to the public for a period in excess of six years. For purposes of federal law, it stands in the same stead as an item for which a patent has expired or been denied: it is unpatented and unpatentable. See 35 U. S. C. § 102(b). Whether because of a determination of unpatentability or other commercial concerns, petitioner chose to expose its hull design to the public in the marketplace, eschewing the bargain held out by the federal patent system of disclosure in exchange for exclusive use. Yet, the Florida statute allows petitioner to reassert a substantial property right in the idea, thereby constricting the spectrum of useful public knowledge. Moreover, it does so without the careful protections of high standards of innovation and limited monopoly contained in the federal scheme. We think it clear that such protection conflicts with the federal policy "that all ideas in general circulation be dedicated to the common good

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and novel and nonobvious, a patent in the process may support a patent in the resulting product. See U. S. Patent and Trademark Office, Manual of Patent Examining Procedure § 706.03(e) (5th rev. ed. 1986) ("An article may be claimed by a process of making it provided it is definite"). The Florida statute at issue here grants boat hull manufacturers substantial control over the use of a particular process and the sale of an article created by that process without regard to the novelty or nonobviousness of either the end product or the process by which it was created. Under federal law, this type of protection would be unavailable to petitioner absent satisfaction of the requirements of patentability. See *In re Thorpe*, 777 F. 2d 695, 697 (CA Fed. 1985) (product-by-process patent properly denied where end result was indistinguishable from prior art).

unless they are protected by a valid patent." *Lear, Inc.* v. *Adkins*, 395 U. S., at 668.

That the Florida statute does not remove all means of reproduction and sale does not eliminate the conflict with the federal scheme. See *Kellogg*, 305 U. S., at 122. In essence, the Florida law prohibits the entire public from engaging in a form of reverse engineering of a product in the public domain. This is clearly one of the rights vested in the federal patent holder, but has never been a part of state protection under the law of unfair competition or trade secrets. See *Kewanee*, 416 U. S., at 476 ("A trade secret law, however, does not offer protection against discovery by . . . so-called reverse engineering, that is by starting with the known product and working backward to divine the process which aided in its development or manufacture"); see also *Chicago Lock Co.* v. *Fanberg*, 676 F. 2d 400, 405 (CA9 1982) ("A lock purchaser's own reverse-engineering of his own lock, and subsequent publication of the serial number-key code correlation, is an example of the independent invention and reverse engineering expressly allowed by trade secret doctrine"). The duplication of boat hulls and their component parts may be an essential part of innovation in the field of hydrodynamic design. Variations as to size and combination of various elements may lead to significant advances in the field. Reverse engineering of chemical and mechanical articles in the public domain often leads to significant advances in technology. If Florida may prohibit this particular method of study and recomposition of an unpatented article, we fail to see the principle that would prohibit a State from banning the use of chromatography in the reconstitution of unpatented chemical compounds, or the use of robotics in the duplication of machinery in the public domain.

Moreover, as we noted in *Kewanee*, the competitive reality of reverse engineering may act as a spur to the inventor, creating an incentive to develop inventions that meet the rigorous requirements of patentability. 416 U. S., at 489–490.

The Florida statute substantially reduces this competitive incentive, thus eroding the general rule of free competition upon which the attractiveness of the federal patent bargain depends. The protections of state trade secret law are most effective at the developmental stage, before a product has been marketed and the threat of reverse engineering becomes real. During this period, patentability will often be an uncertain prospect, and to a certain extent, the protection offered by trade secret law may "dovetail" with the incentives created by the federal patent monopoly. See Goldstein, Kewanee Oil Co. v. Bicron Corp.: Notes on a Closing Circle, 1974 S. Ct. Rev. 81, 92. In contrast, under the Florida scheme, the would-be inventor is aware from the outset of his efforts that rights against the public are available regardless of his ability to satisfy the rigorous standards of patentability. Indeed, it appears that even the most mundane and obvious changes in the design of a boat hull will trigger the protections of the statute. See Fla. Stat. § 559.94(2) (1987) (protecting "any manufactured vessel hull or component part"). Given the substantial protection offered by the Florida scheme, we cannot dismiss as hypothetical the possibility that it will become a significant competitor to the federal patent laws, offering investors similar protection without the *quid pro quo* of substantial creative effort required by the federal statute. The prospect of all 50 States establishing similar protections for preferred industries without the rigorous requirements of patentability prescribed by Congress could pose a substantial threat to the patent system's ability to accomplish its mission of promoting progress in the useful arts.

Finally, allowing the States to create patent-like rights in various products in public circulation would lead to administrative problems of no small dimension. The federal patent scheme provides a basis for the public to ascertain the status of the intellectual property embodied in any article in general circulation. Through the application process, detailed in-

formation concerning the claims of the patent holder is compiled in a central location. See 35 U. S. C. §§ 111–114. The availability of damages in an infringement action is made contingent upon affixing a notice of patent to the protected article. 35 U. S. C. § 287. The notice requirement is designed "for the information of the public," *Wine Railway Appliance Co.* v. *Enterprise Railway Equipment Co.*, 297 U. S. 387, 397 (1936), and provides a ready means of discerning the status of the intellectual property embodied in an article of manufacture or design. The public may rely upon the lack of notice in exploiting shapes and designs accessible to all. See *Devices for Medicine, Inc.* v. *Boehl*, 822 F. 2d 1062, 1066 (CA Fed. 1987) ("Having sold the product unmarked, [the patentee] could hardly maintain entitlement to damages for its use by a purchaser uninformed that such use would violate [the] patent").

The Florida scheme blurs this clear federal demarcation between public and private property. One of the fundamental purposes behind the Patent and Copyright Clauses of the Constitution was to promote national uniformity in the realm of intellectual property. See The Federalist No. 43, p. 309 (B. Wright ed. 1961). Since the Patent Act of 1800, Congress has lodged exclusive jurisdiction of actions "arising under" the patent laws in the federal courts, thus allowing for the development of a uniform body of law in resolving the constant tension between private right and public access. See 28 U. S. C. § 1338; see also Chisum, The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation, 46 Wash. L. Rev. 633, 636 (1971). Recently, Congress conferred exclusive jurisdiction of all patent appeals on the Court of Appeals for the Federal Circuit, in order to "provide nationwide uniformity in patent law." H. R. Rep. No. 97–312, p. 20 (1981). This purpose is frustrated by the Florida scheme, which renders the status of the design and utilitarian "ideas" embodied in the boat hulls it protects uncertain. Given the inherently ephemeral nature

of property in ideas, and the great power such property has to cause harm to the competitive policies which underlay the federal patent laws, the demarcation of broad zones of public and private right is "the type of regulation that demands a uniform national rule." *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 179 (1978). Absent such a federal rule, each State could afford patent-like protection to particularly favored home industries, effectively insulating them from competition from outside the State.

Petitioner and its supporting *amici* place great weight on the contrary decision of the Court of Appeals for the Federal Circuit in *Interpart Corp.* v. *Italia.* In upholding the application of the California "antidirect molding" statute to the duplication of unpatented automobile mirrors, the Federal Circuit stated: "The statute prevents unscrupulous competitors from obtaining a product and using it as the 'plug' for making a mold. The statute does not prohibit copying the design of the product in any other way; the latter if in the public domain, is free for anyone to make, use or sell." 777 F. 2d, at 685. The court went on to indicate that "the patent laws 'say nothing about the right to copy or the right to use, they speak only in terms of the right to exclude.'" *Ibid.*, quoting *Mine Safety Appliances Co.* v. *Electric Storage Battery Co.*, 56 C. C. P. A. (Pat.) 863, 864, n. 2, 405 F. 2d 901, 902, n. 2 (1969).

We find this reasoning defective in several respects. The Federal Circuit apparently viewed the direct molding statute at issue in *Interpart* as a mere regulation of the use of chattels. Yet, the very purpose of antidirect molding statutes is to "reward" the "inventor" by offering substantial protection against public exploitation of his or her idea embodied in the product. Such statutes would be an exercise in futility if they did not have precisely the effect of substantially limiting the ability of the public to exploit an otherwise unprotected idea. As *amicus* points out, the direct molding process itself has been in use since the early 1950's. See Brief for Charles

E. Lipsey as *Amicus Curiae* 3, n. 2. Indeed, U. S. Patent No. 3,419,646, issued to Robert L. Smith in 1968, explictly discloses and claims a method for the direct molding of boat hulls. The specifications of the Smith Patent indicate that "[i]t is a major object of the present invention to provide a method for making large molded boat hull molds at very low cost, once a prototype hull has been provided." App. to Brief for Charles E. Lipsey as *Amicus Curiae* 15a. In fact, it appears that Bonito employed a similar process in the creation of its own production mold. See *supra*, at 144. It is difficult to conceive of a more effective method of creating substantial property rights in an intellectual creation than to eliminate the most efficient method for its exploitation. *Sears* and *Compco* protect more than the right of the public to contemplate the abstract beauty of an otherwise unprotected intellectual creation—they assure its efficient reduction to practice and sale in the marketplace.

Appending the conclusionary label "unscrupulous" to such competitive behavior merely endorses a policy judgment which the patent laws do not leave the States free to make. Where an item in general circulation is unprotected by patent, "[r]eproduction of a functional attribute is legitimate competitive activity." *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844, 863 (1982) (WHITE, J., concurring in result). See also *Bailey* v. *Logan Square Typographers, Inc.*, 441 F. 2d 47, 51 (CA7 1971) (Stevens, J.) ("[T]hat which is published may be freely copied as a matter of federal right").

Finally, we are somewhat troubled by the *Interpart* court's reference to the *Mine Safety* case for the proposition that the patent laws say "nothing about the right to copy or the right to use." As noted above, the federal standards for patentability, at a minimum, express the congressional determination that patent-like protection is unwarranted as to certain classes of intellectual property. The States are simply not free in this regard to offer equivalent protections to ideas

which Congress has determined should belong to all. For almost 100 years it has been well established that in the case of an expired patent, the federal patent laws *do* create a federal right to "copy and to use." *Sears* and *Compco* extended that rule to potentially patentable ideas which are fully exposed to the public. The *Interpart* court's assertion to the contrary is puzzling and flies in the face of the same court's decisions applying the teaching of *Sears* and *Compco* in other contexts. See *Power Controls Corp.* v. *Hybrinetics, Inc.*, 806 F. 2d 234, 240 (CA Fed. 1986) ("It is well established . . . that an action for unfair competition cannot be based upon a functional design"); *Gemveto Jewelry Co.* v. *Jeff Cooper Inc.*, 800 F. 2d 256, 259 (CA Fed. 1986) (vacating injunction against copying of jewelry designs issued under state law of unfair competition "in view of the *Sears* and *Compco* decisions which hold that copying of the article itself that is unprotected by the federal patent and copyright laws cannot be protected by state law").

Our decisions since *Sears* and *Compco* have made it clear that the Patent and Copyright Clauses do not, by their own force or by negative implication, deprive the States of the power to adopt rules for the promotion of intellectual creation within their own jurisdictions. See *Aronson*, 440 U. S., at 262; *Goldstein* v. *California*, 412 U. S. 546, 552–561 (1973); *Kewanee*, 416 U. S., at 478–479. Thus, where "Congress determines that neither federal protection nor freedom from restraint is required by the national interest," *Goldstein*, *supra*, at 559, the States remain free to promote originality and creativity in their own domains.

Nor does the fact that a particular item lies within the subject matter of the federal patent laws necessarily preclude the States from offering limited protection which does not impermissibly interfere with the federal patent scheme. As *Sears* itself makes clear, States may place limited regulations on the use of unpatented designs in order to prevent consumer confusion as to source. In *Kewanee*, we found that

state protection of trade secrets, as applied to both patentable and unpatentable subject matter, did not conflict with the federal patent laws. In both situations, state protection was not aimed exclusively at the promotion of invention itself, and the state restrictions on the use of unpatented ideas were limited to those necessary to promote goals outside the contemplation of the federal patent scheme. Both the law of unfair competition and state trade secret law have coexisted harmoniously with federal patent protection for almost 200 years, and Congress has given no indication that their operation is inconsistent with the operation of the federal patent laws. See *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 144 (1963); *United States* v. *Bass*, 404 U. S. 336, 349 (1971).

Indeed, there are affirmative indications from Congress that both the law of unfair competition and trade secret protection are consistent with the balance struck by the patent laws. Section 43(a) of the Lanham Act, 60 Stat. 441, 15 U. S. C. § 1125(a), creates a federal remedy for making "a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same . . . ." Congress has thus given federal recognition to many of the concerns that underlie the state tort of unfair competition, and the application of *Sears* and *Compco* to nonfunctional aspects of a product which have been shown to identify source must take account of competing federal policies in this regard. Similarly, as JUSTICE MARSHALL noted in his concurring opinion in *Kewanee:* "State trade secret laws and the federal patent laws have co-existed for many, many, years. During this time, Congress has repeatedly demonstrated its full awareness of the existence of the trade secret system, without any indication of disapproval. Indeed, Congress has in a number of instances given explicit federal protection to trade secret information provided to federal agencies." *Kewanee*, *supra*, at 494 (concurring in result) (citation omitted). The case for

federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to "stand by both concepts and to tolerate whatever tension there [is] between them." *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 256 (1984). The same cannot be said of the Florida statute at issue here, which offers protection beyond that available under the law of unfair competition or trade secret, without any showing of consumer confusion, or breach of trust or secrecy.

The Florida statute is aimed directly at the promotion of intellectual creation by substantially restricting the public's ability to exploit ideas that the patent system mandates shall be free for all to use. Like the interpretation of Illinois unfair competition law in *Sears* and *Compco*, the Florida statute represents a break with the tradition of peaceful coexistence between state market regulation and federal patent policy. The Florida law substantially restricts the public's ability to exploit an unpatented design in general circulation, raising the specter of state-created monopolies in a host of useful shapes and processes for which patent protection has been denied or is otherwise unobtainable. It thus enters a field of regulation which the patent laws have reserved to Congress. The patent statute's careful balance between public right and private monopoly to promote certain creative activity is a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947).

Congress has considered extending various forms of limited protection to industrial design either through the copyright laws or by relaxing the restrictions on the availability of design patents. See generally Brown, Design Protection: An Overview, 34 UCLA L. Rev. 1341 (1987). Congress explicitly refused to take this step in the copyright laws, see 17 U. S. C. § 101; H. R. Rep. No. 94–1476, p. 55 (1976), and de-

spite sustained criticism for a number of years, it has declined to alter the patent protections presently available for industrial design. See Report of the President's Commission on the Patent System, S. Doc. No. 5, 90th Cong., 1st Sess., 20–21 (1967); Lindgren, The Sanctity of the Design Patent: Illusion or Reality?, 10 Okla. City L. Rev. 195 (1985). It is for Congress to determine if the present system of design and utility patents is ineffectual in promoting the useful arts in the context of industrial design. By offering patent-like protection for ideas deemed unprotected under the present federal scheme, the Florida statute conflicts with the "strong federal policy favoring free competition in ideas which do not merit patent protection." *Lear, Inc.*, 395 U. S., at 656. We therefore agree with the majority of the Florida Supreme Court that the Florida statute is preempted by the Supremacy Clause, and the judgment of that court is hereby affirmed.

It is so ordered.

OSTERNECK ET AL. *v.* ERNST & WHINNEY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87-1201. Argued November 29, 1988—Decided February 21, 1989

As part of the merger of a company that they owned with another company, petitioners exchanged stock in their company for stock in the other company. In approving the merger, petitioners allegedly relied on the other company's financial statements prepared by respondent accounting firm. Subsequently, petitioners concluded that certain of those statements misrepresented the company's financial condition. They then filed an action in Federal District Court against respondent and others, alleging violations of the Securities Exchange Act of 1934, Rule 10b–5 thereunder, and state common law. While returning a verdict against some of the defendants, the jury found in favor of respondent and another defendant. After judgment was entered, petitioners filed a timely motion for prejudgment interest. While that motion was still pending, petitioners filed a notice of appeal from the judgment in favor of respondent and the other defendant. Ultimately, the court granted the motion for prejudgment interest and ordered that the judgment be amended to include that interest. The Court of Appeals held that petitioners' motion for prejudgment interest was a motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e), which rendered the notice of appeal ineffective under Federal Rule of Appellate Procedure 4(a)(4), which provides that if a party files a timely motion under Rule 59(e) to alter or amend the judgment a notice of appeal filed before the disposition of that motion "shall have no effect." The court also rejected petitioners' contention that *Thompson* v. *INS*, 375 U. S. 384, required it to hear their appeal because they had relied on several actions of the District Court that indicated that the judgment was final and appealable notwithstanding the pending motion for prejudgment interest.

Held: Petitioners' motion for prejudgment interest constituted a Rule 59(e) motion and rendered ineffective under Rule 4(a)(4) their notice of appeal filed before a ruling on that motion. Pp. 173–179.

(a) Prejudgment interest is part of the compensation due a plaintiff. A postjudgment motion for discretionary prejudgment interest involves the kind of reconsideration of matters encompassed within the merits of a judgment to which Rule 59(e) was intended to apply. Pp. 174–176.

(b) To conclude that a postjudgment motion for discretionary prejudgment interest is a Rule 59(e) motion helps further the important goal of

avoiding piecemeal appellate review of judgments. Moreover, by preventing appellate review before such a motion is resolved, that conclusion gives added assurance that an appellate court will have the benefit of the district court's plenary findings with regard to factual and legal issues subsumed in the decision to grant prejudgment interest. Pp. 177–178.

(c) On the record, the Court of Appeals correctly declined to apply the reasoning of *Thompson*, *supra*, to excuse petitioners' failure to file an effective notice of appeal. By its terms, *Thompson* applies only where a party has performed an act that, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done. That is not the case here. Pp. 178–179.

825 F. 2d 1521, affirmed.

KENNEDY, J., delivered the opinion for a unanimous Court.

Laurie Webb Daniel argued the cause for petitioners. With her on the briefs were *Harold T. Daniel, Jr.*, *Keith M. Wiener*, and *Paul Webb, Jr.*

Gordon Lee Garrett, Jr., argued the cause for respondent. With him on the brief was *William B. B. Smith.*

JUSTICE KENNEDY delivered the opinion of the Court.

Federal Rule of Appellate Procedure 4(a)(4) provides that if any party files a timely motion "under Rule 59 [of the Federal Rules of Civil Procedure] to alter or amend the judgment," a notice of appeal filed before the disposition of that motion "shall have no effect." In this case, we decide whether a motion for discretionary prejudgment interest filed after the entry of judgment constitutes a Rule 59 motion to alter or amend the judgment and renders ineffective any notice of appeal filed before a ruling on that motion. If we decide the question in the affirmative, we are asked to decide whether this case nevertheless falls within the so-called "unique circumstances" exception to the timely appeal requirement announced in *Thompson* v. *INS*, 375 U. S. 384 (1964) *(per curiam)*.

I

The history of this case is complex but can be stated in a summary way. In September 1969, the Cavalier Bag Com-

pany merged into E. T. Barwick Industries, Inc. (Barwick Industries). The Osternecks, owners of Cavalier and petitioners here, approved the merger and exchanged their stock in Cavalier for stock in Barwick Industries. In approving the transaction, petitioners allegedly relied on financial statements of Barwick Industries prepared by Ernst & Whinney, an independent certified public accounting firm and the respondent here.

Sometime later, petitioners concluded that Barwick Industries' financial statements for two years preceding the merger misrepresented the company's actual financial condition. In 1975, petitioners filed this action alleging violations of §§ 10(b) and 20 of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 891, 899, as amended, 15 U. S. C. §§ 78j(b), 78t (1982 ed. and Supp. IV), Rule 10b–5 thereunder, 17 CFR § 240.10b–5 (1975), and Georgia common law. Petitioners named as defendants, among others, Barwick Industries, respondent Ernst & Whinney, and certain directors and officers of Barwick Industries (E. T. Barwick, B. A. Talley, and M. E. Kellar).

After nearly 10 years of pretrial proceedings, the case finally went to trial in 1984. The jury returned a verdict against Barwick Industries, M. E. Kellar, and B. A. Talley in the amount of $2,632,234 in compensatory damages for violations of the federal securities laws and Georgia common law. The jury found in favor of E. T. Barwick and respondent Ernst & Whinney.

Immediately after the jury verdict was announced, petitioners moved orally for prejudgment interest on the damages assessed against Barwick Industries, M. E. Kellar, and B. A. Talley. The District Judge, not wishing to hear argument on petitioners' motion at that point, directed petitioners to submit their motion for prejudgment interest in writing within 10 days. He stated:

> "The judgment will be entered on this particular verdict as soon as possible, then if prejudgment interest is

granted it will be—the judgment can be amended." App. 5.

The judgment was filed and entered on the same day, January 30, 1985. *Id.*, at 6–7. On February 11, 1985, petitioners, as directed, filed a written motion for prejudgment interest. *Id.*, at 8–9.

During March 1985, the various parties filed notices of appeal and cross-appeal challenging the January 30 judgment. Of particular importance here, on March 1, 1985, while their motion for prejudgment interest was still pending, petitioners filed a notice of appeal from the January 30, 1985, judgment in favor of E. T. Barwick and respondent Ernst & Whinney. *Id.*, at 34.

The District Court did not rule on petitioners' motion for prejudgment interest until July 1, 1985. On that date, the court entered an order stating that the final judgment shall be "AMENDED" to reflect an "additional award of [$945,512.85 in] prejudgment interest on the federal securities claim." *Id.*, at 44. On July 9, 1985, the District Court filed a document captioned "AMENDED JUDGMENT," stating that the January 30, 1985, judgment "is hereby amended by adding thereto . . . [the] award of prejudgment interest," but shall "remain the same in every other respect." *Id.*, at 45. After the amended judgment had been entered, petitioners filed one additional notice of appeal on July 31, 1985, captioned as a cross-appeal against M. E. Kellar, B. A. Talley, E. T. Barwick, and Barwick Industries. *Id.*, at 46–47. But, and this is the vital fact for purposes of this case, the notice failed to include respondent Ernst & Whinney as a party to the appeal.

The Court of Appeals dismissed petitioners' appeal as to Ernst & Whinney for lack of jurisdiction, finding that no effective notice had been filed. *Osterneck* v. *E. T. Barwick Industries, Inc.*, 825 F. 2d 1521 (CA11 1987). The Court of Appeals concluded that petitioners' February 11, 1985, mo-

tion for prejudgment interest was a motion to alter or amend the judgment under Rule 59(e), which rendered ineffective under Federal Rule of Appellate Procedure 4(a)(4) the March 1, 1985, notice of appeal filed before the disposition of the prejudgment interest motion. 825 F. 2d, at 1525–1527.[1] The Court of Appeals rejected petitioners' contention, based on our decision in *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445 (1982), that their motion for prejudgment interest was not a motion to alter or amend the judgment under Rule 59(e) because it merely addressed an issue collateral to the main cause of action. 825 F. 2d, at 1526. The Court of Appeals also rejected petitioners' contention that our decision in *Thompson* v. *INS*, 375 U. S. 384 (1964) *(per curiam)*, required that it hear their appeal because they had relied upon several actions of the District Court which indicated that the January 30, 1985, judgment was final and appealable notwithstanding the pending motion for prejudgment interest. 825 F. 2d, at 1527–1528.

Petitioners sought review here, and we granted certiorari, 486 U. S. 1042 (1988), to resolve a conflict in the Courts of Appeals over whether a motion for prejudgment interest filed after the entry of judgment constitutes a Rule 59(e) motion to alter or amend the judgment. Cf. *Jenkins* v. *Whittaker Corp.*, 785 F. 2d 720 (CA9 1986). We also agreed to consider, if necessary, whether the Court of Appeals erred in not entertaining petitioners' appeal under the reasoning of *Thompson*, *supra*. We now affirm.

II

Rule 59(e) of the Federal Rules of Civil Procedure provides that a motion to "alter or amend the judgment" shall be served within 10 days of the entry of judgment. Rule 4(a)(4) of the

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[1] The Court of Appeals also found that petitioners' July 31, 1985, notice of cross-appeal was ineffective as to the judgment in favor of respondent because respondent was not named in that notice. 825 F. 2d, at 1528–1529. Petitioners have not sought review of that ruling in this Court.

Federal Rules of Appellate Procedure provides that a notice of appeal filed while a timely Rule 59(e) motion is pending has no effect. Together, these Rules work to implement the finality requirement of 28 U. S. C. § 1291 by preventing the filing of an effective notice of appeal until the District Court has had an opportunity to dispose of all motions that seek to amend or alter what otherwise might appear to be a final judgment.

A

White v. *New Hampshire Dept. of Employment Security*, *supra*, at 451, set the general framework for determining whether a postjudgment motion constitutes a Rule 59(e) motion to alter or amend the judgment. In that case, we held that a request for attorney's fees under 42 U. S. C. § 1988 was not a Rule 59(e) motion. We stated in *White* that a postjudgment motion will be considered a Rule 59(e) motion where it involves "reconsideration of matters properly encompassed in a decision on the merits." 455 U. S., at 451, citing *Browder* v. *Director, Illinois Dept. of Corrections*, 434 U. S. 257 (1978). We concluded that a request for attorney's fees did not fit this description because it raised legal issues "collateral to the main cause of action," 455 U. S., at 451, requiring an inquiry that was wholly "separate from the decision on the merits," *id.*, at 451–452. We noted, moreover, that because attorney's fees under § 1988 are not considered compensation for the injury giving rise to the cause of action, their award was "uniquely separable" from the underlying merits of the controversy. *Id.*, at 452.

We revisited the question of what constitutes a Rule 59(e) motion last Term. In *Buchanan* v. *Stanships, Inc.*, 485 U. S. 265 (1988), we considered whether a motion for the allowance of costs under Federal Rule of Civil Procedure 54(d) was a motion to alter or amend the judgment. In concluding that it was not, we relied on the fact that Federal Rule of Civil Procedure 58 draws a "sharp distinction" between a district court's judgment on the merits and an award of costs.

485 U. S., at 268. Moreover, we observed that, as with the attorney's fees in *White*, a motion for costs filed under Rule 54(d) "raises issues wholly collateral to the judgment in the main cause of action." 485 U. S., at 268.

In *Budinich* v. *Becton Dickinson & Co.*, 486 U. S. 196 (1988), the issue was not whether a particular kind of motion constitutes a Rule 59(e) motion, but rather the related question whether a judgment is final under 28 U. S. C. § 1291 when a motion for attorney's fees remains to be resolved. We acknowledged in *Budinich* that our earlier decision in *White*, holding that a request for attorney's fees under § 1988 was not a Rule 59(e) motion, "all but" answered the finality question. We went on to reiterate that, as a general matter, a request for attorney's fees is not part of the merits of the underlying action because such fees are not part of the compensation for the plaintiff's injury but traditionally have been regarded as an element of costs awarded to the prevailing party. 486 U. S., at 199–201.

Under these precedents, the Court of Appeals was correct to conclude that a postjudgment motion for discretionary prejudgment interest constitutes a motion to alter or amend the judgment under Rule 59(e). First, we have repeatedly stated that prejudgment interest "is an element of [plaintiff's] complete compensation." *West Virginia* v. *United States*, 479 U. S. 305, 310, and n. 2 (1987); see *General Motors Corp.* v. *Devex Corp.*, 461 U. S. 648, 655–656, and n. 10 (1983). Thus, unlike attorney's fees, which at common law were regarded as an element of costs and therefore not part of the merits judgment, see *Budinich*, *supra*, at 200–201, prejudgment interest traditionally has been considered part of the compensation due plaintiff.

Second, unlike a request for attorney's fees or a motion for costs, a motion for discretionary prejudgment interest does not "rais[e] issues wholly collateral to the judgment in the main cause of action," *Buchanan*, *supra*, at 268; see *White*, 455 U. S., at 451, nor does it require an inquiry

wholly "separate from the decision on the merits," *id.*, at 451–452. In deciding if and how much prejudgment interest should be granted, a district court must examine—or in the case of a postjudgment motion, reexamine—matters encompassed within the merits of the underlying action. For example, in a federal securities action such as this case, a district court will consider a number of factors, including whether prejudgment interest is necessary to compensate the plaintiff fully for his injuries, the degree of personal wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed in bringing or prosecuting the action, and other fundamental considerations of fairness.[2] See *Norte & Co.* v. *Huffines*, 416 F. 2d 1189, 1191–1192 (CA2 1969), cert. denied *sub nom. Muscat* v. *Norte & Co.*, 397 U. S. 989 (1970); *City National Bank* v. *American Commonwealth Financial Corp.*, 608 F. Supp. 941, 943 (WDNC 1985); *Fox* v. *Kane-Miller Corp.*, 398 F. Supp. 609, 651 (Md. 1975); see also generally *Blau* v. *Lehman*, 368 U. S. 403, 414 (1962) ("[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness"). These considerations are intertwined in a significant way with the merits of the plaintiff's primary case as well as the extent of his damages. Thus, we conclude that a postjudgment motion for discretionary prejudgment interest involves the kind of reconsideration of matters encompassed within the merits of a judgment to which Rule 59(e) was intended to apply.[3]

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[2] We do not intend here to specify what factors a district court must consider when deciding under federal law whether to grant prejudgment interest. We offer this list of factors, taken from lower court cases, merely to demonstrate that the inquiry involves issues intertwined to a significant extent with the merits of the underlying controversy.

[3] We do not believe the result should be different where prejudgment interest is available as a matter of right. It could be argued that where a party is entitled to prejudgment interest as a matter of right, a reexamination of issues relevant to the underlying merits is not necessary, and there-

Our conclusion that a postjudgment motion for discretionary prejudgment interest is a Rule 59(e) motion also helps further the important goal of avoiding piecemeal appellate review of judgments. Cf. *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 265 (1982) ("[T]he policy of Congress embodied in [28 U. S. C. § 1291] is inimical to piecemeal appellate review of trial court decisions"). Because Federal Rule of Appellate Procedure 4(a)(4) renders ineffective any notice of appeal filed while a Rule 59(e) motion is pending, the decision whether a particular pending motion falls under Rule 59(e) will of necessity determine whether an otherwise final judgment is appealable. By preventing appellate review before a postjudgment motion for prejudgment interest is resolved, the rule we adopt today gives added assurance that an appellate court will have the benefit of the district court's plenary findings with regard to factual and legal issues subsumed in the decision to grant discretionary prejudgment interest, such as the wrongfulness of the defendant's conduct and the plaintiff's full damages, as well as other matters of equity bearing on the merits of the litigation. Such information may well be useful to a complete understanding of the district court's findings on liability and damages. We do not anticipate that our holding will result in undue delays in the entry of a final judgment. Any evidence relating to the

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fore the motion should be deemed collateral in the sense we have used that term. However, mandatory prejudgment interest, no less than discretionary prejudgment interest, serves to "remedy the injury giving rise to the [underlying] action," *Budinich* v. *Becton Dickinson & Co.*, 486 U. S. 196, 200 (1988), and in that sense is part of the merits of the district court's decision. Moreover, as we said last Term in *Budinich:* "[W]hat is of importance here is not preservation of conceptual consistency in the status of a particular [type of motion] as 'merits' or 'nonmerits,' but rather preservation of operational consistency and predictability in the overall application of the [finality requirement] of § 1291." *Ibid.* "Courts and litigants are best served by the bright-line rule, which accords with traditional understanding," *ibid.*, that a motion for prejudgment interest implicates the merits of the district court's judgment.

question of prejudgment interest should be available at the time that the other issues in the case are tried, and the district court should be able to dispose of a motion for prejudgment interest within a reasonable time after the entry of verdict.

III

Petitioners contend that even if their March 1, 1985, notice of appeal was rendered ineffective by the filing of their motion for prejudgment interest, the Court of Appeals nevertheless should have heard their appeal based on the rationale of *Thompson* v. *INS*, 375 U. S. 384 (1964). In that case, the petitioner filed with the District Court a motion for a new trial within 10 days of receiving notice of the entry of judgment, but 12 days after the judgment was entered. Although this motion was in fact untimely, the District Court specifically declared that it had been filed "'in ample time.'" *Id.*, at 385. In reliance on this statement, the petitioner in *Thompson* did not file an appeal from the District Court's original judgment, but rather filed a timely appeal from the later denial of his motion for a new trial. Because it found that petitioner's motion for a new trial was not timely filed, the Court of Appeals dismissed his appeal. In light of these "unique circumstances," we reversed. *Id.*, at 387. Because petitioner had filed his notice of appeal in reliance on the specific statement of the District Court that his motion for a new trial was timely, we felt that fairness required that the Court of Appeals excuse his untimely appeal. See *ibid.*

Petitioners contend that the rationale of *Thompson* is applicable here because certain statements made by the District Court, as well as certain actions taken by the District Court, the District Court Clerk, and the Court of Appeals, led them to believe that their notice of appeal was timely. After reviewing these claims, the Court of Appeals declined to apply the *Thompson* exception, concluding:

> "At no time has the district court or this court ever affirmatively represented to the Osternecks that their ap-

peal was timely filed, nor did the Osternecks ever seek such assurance from either court." 825 F. 2d, at 1528.

After reviewing the record, we conclude that the Court of Appeals was correct in declining to apply our reasoning in *Thompson* to excuse petitioners' failure to file an effective notice of appeal. By its terms, *Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done. That is not the case here.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

IN RE McDONALD

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 88-5890. Decided February 21, 1989

Pro se petitioner filed a motion for leave to proceed *in forma pauperis* on his petition before this Court for a writ of habeas corpus. Since 1971, he has made 73 other filings with this Court—including 19 for extraordinary relief—all of which have been denied without recorded dissent.

Held: Petitioner's motion for leave to proceed *in forma pauperis* is denied, and the Clerk is directed not to accept any further petitions from him for extraordinary writs unless he pays the docketing fee required by this Court's Rule 45(a) and submits his petition in compliance with Rule 33. The continual processing of his frivolous requests for extraordinary writs does not permit the Court to allocate its limited resources in a way that promotes the interests of justice. Paupers filing *pro se* petitions are not subject to the financial considerations that deter other litigants from filing frivolous petitions, and lower courts have issued orders intended to curb serious abuses by persons proceeding *in forma pauperis*. Petitioner remains free to file *in forma pauperis* requests for other relief, if he qualifies and does not similarly abuse that privilege.

Motion denied.

PER CURIAM.

Pro se petitioner Jessie McDonald requests that this Court issue a writ of habeas corpus pursuant to 28 U. S. C. § 2241(a). He also requests that he be permitted to proceed *in forma pauperis* under this Court's Rule 46. We deny petitioner leave to proceed *in forma pauperis*. He is allowed until March 14, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with this Court's Rule 33. We also direct the Clerk not to accept any further petitions from petitioner for extraordinary writs pursuant to 28 U. S. C. §§ 1651(a), 2241, and 2254(a), unless he pays the docketing fee required by Rule 45(a) and submits his petition in compliance with Rule 33. We explain below our reasons for taking this step.

Petitioner is no stranger to us. Since 1971, he has made 73 separate filings with the Court, not including this petition,

which is his eighth so far this Term. These include 4 appeals,[1] 33 petitions for certiorari,[2] 19 petitions for extraordinary writs,[3] 7 applications for stays and other injunctive re-

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[1] See *McDonald* v. *Alabama*, 479 U. S. 1061 (1987); *In re McDonald*, 466 U. S. 957 (1984); *McDonald* v. *Tennessee*, 432 U. S. 901 (1977); *McDonald* v. *Purity Dairies Employees Federal Credit Union*, 431 U. S. 961 (1977).

[2] See *McDonald* v. *Tobey*, 488 U. S. 971 (1988); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 481 U. S. 1053 (1987); *McDonald* v. *Tennessee*, 475 U. S. 1088 (1986); *McDonald* v. *Tennessee*, 474 U. S. 951 (1985); *McDonald* v. *Leech*, 467 U. S. 1208 (1984); *McDonald* v. *Humphries*, 461 U. S. 946 (1983); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 461 U. S. 934 (1983); *McDonald* v. *Draper*, 459 U. S. 1112 (1983); *McDonald* v. *Thompson*, 456 U. S. 981 (1982); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 455 U. S. 957 (1982); *McDonald* v. *Tennessee*, 454 U. S. 1088 (1981); *McDonald* v. *Draper*, 452 U. S. 965 (1981); *McDonald* v. *Tennessee*, 450 U. S. 983 (1981); *McDonald* v. *Draper*, 450 U. S. 983 (1981); *McDonald* v. *Metropolitan Airport Authority*, 450 U. S. 1002 (1981); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 450 U. S. 933 (1981); *McDonald* v. *United States District Court*, 444 U. S. 900 (1979); *McDonald* v. *Birch*, 444 U. S. 875 (1979); *McDonald* v. *United States District Court* and *McDonald* v. *Yellow Freight Systems, Inc.*, 444 U. S. 875 (1979); *McDonald* v. *Thompson*, 436 U. S. 911 (1978); *McDonald* v. *Tennessee*, 434 U. S. 866 (1977); *McDonald* v. *Davidson County Election Comm'n*, 431 U. S. 958 (1977); *McDonald* v. *Tennessee*, 431 U. S. 933 (1977); *McDonald* v. *Tennessee*, 429 U. S. 1064 (1977); *McDonald* v. *Tennessee*, 425 U. S. 955 (1976); *McDonald* v. *Tennessee*, 423 U. S. 991 (1975); *McDonald* v. *Tennessee*, 416 U. S. 975 (1974); *McDonald* v. *Tennessee*, 415 U. S. 961 (1974); *McDonald* v. *Wellons*, 414 U. S. 1074 (1973); *McDonald* v. *Metro Traffic and Parking Comm'n*, 409 U. S. 1117 (1973); *McDonald* v. *Wellons*, 405 U. S. 928 (1972); *McDonald* v. *Metropolitan Traffic and Parking Comm'n*, 404 U. S. 843 (1971).

[3] *In re McDonald*, 488 U. S. 940 (1988) (mandamus and/or prohibition); *In re McDonald*, 488 U. S. 940 (1988) (mandamus and/or prohibition); *In re McDonald*, 488 U. S. 940 (1988) (mandamus and/or prohibition); *In re McDonald*, 488 U. S. 813 (1988) (common law certiorari); *In re McDonald*, 488 U. S. 813 (1988) (common law certiorari); *In re McDonald*, 488 U. S. 813 (1988) (common law certiorari); *In re McDonald*, 485 U. S. 986 (1988) (mandamus); *In re McDonald*, 484 U. S. 812 (1987) (common law certiorari); *In re McDonald*, 484 U. S. 812 (1987) (habeas corpus); *In re McDonald*, 484 U. S. 812 (1987) (common law certiorari and habeas corpus); *In re*

lief,[4] and 10 petitions for rehearing.[5] Without recorded dissent, the Court has denied all of his appeals and denied all of his various petitions and motions. We have never previously denied him leave to proceed *in forma pauperis*.[6]

The instant petition for a writ of habeas corpus arises from petitioner's 1974 state conviction for obtaining title to a 1972 Ford LTD automobile under false pretenses, for which he was sentenced to three years' imprisonment. Petitioner appealed to the Tennessee Court of Criminal Appeals, which reversed his conviction on the ground that there was no evi-

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McDonald, 479 U. S. 809 (1986) (habeas corpus); *In re McDonald*, 470 U. S. 1082 (1985) (habeas corpus); *In re McDonald*, 464 U. S. 811 (1983) (mandamus and/or prohibition); *McDonald* v. *Leathers*, 439 U. S. 815 (1978) (leave to file petition for writ of mandamus); *McDonald* v. *Thompson*, 434 U. S. 812 (1977) (leave to file petition for writ of habeas corpus); *McDonald* v. *Tennessee*, 430 U. S. 963 (1977) (motion to consolidate and for leave to file petition for writ of habeas corpus); *McDonald* v. *Thompson*, 429 U. S. 1088 (1977) (leave to file petition for writ of habeas corpus and other relief); *McDonald* v. *United States Court of Appeals*, 420 U. S. 922 (1975) (leave to file petition for writ of mandamus); *McDonald* v. *Mott*, 410 U. S. 907 (1973) (leave to file petition for writ of mandamus and other relief).

[4] See *McDonald* v. *Metropolitan Government*, 487 U. S. 1230 (1988) (stay); *McDonald* v. *Metropolitan Government of Nashville and Davidson County*, 481 U. S. 1010 (1987) (stay); *McDonald* v. *Alexander*, 458 U. S. 1124 (1982) (injunction); *McDonald* v. *Draper*, 451 U. S. 978 (1981) (stay); *McDonald* v. *Thompson*, 432 U. S. 903 (1977) (application for supersedeas bond); *McDonald* v. *Tennessee*, 429 U. S. 1012 (1976) (stay and other relief); *McDonald* v. *Tennessee*, 415 U. S. 971 (1974) (stay).

[5] See *McDonald* v. *Alabama*, 480 U. S. 912 (1987); *In re McDonald*, 479 U. S. 956 (1986); *McDonald* v. *Tennessee*, 475 U. S. 1151 (1986); *In re McDonald*, 471 U. S. 1062 (1985); *McDonald* v. *Leech*, 467 U. S. 1257 (1984); *McDonald* v. *Draper*, 459 U. S. 1229 (1983); *McDonald* v. *Thompson*, 457 U. S. 1126 (1982); *McDonald* v. *Draper*, 451 U. S. 933 (1981); *McDonald* v. *Tennessee*, 425 U. S. 1000 (1976); *McDonald* v. *Tennessee*, 417 U. S. 927 (1974).

[6] In the affidavit in support of his present motion to proceed *in forma pauperis*, petitioner states that he earns approximately $300 per month, is self-employed, and has less than $25 in his checking or savings account. He states that he has no dependents.

dence that the alleged victim relied on petitioner's false statements. In January 1976, the Supreme Court of Tennessee reinstated his conviction. *State* v. *McDonald*, 534 S. W. 2d 650. We denied certiorari, 425 U. S. 955, and rehearing, 425 U. S. 1000 (1976).

In the 13 years since his conviction became final, petitioner has filed numerous petitions and motions for relief in this Court and in the Tennessee courts, all of which have been rejected. In the instant petition, for example, he requests that the Court "set aside" his conviction and direct the State to "expunge" the conviction "from all public records." He is not presently incarcerated. He contends that his constitutional rights were violated by the State's failure to prove that the property to which he obtained title under false pretenses was valued at over $100, as required by the statute under which he was convicted. Petitioner has put forward this same argument—unsuccessfully—in at least four prior filings with the Court, including a petition for mandamus, which was filed 13 days before the instant petition and was not disposed of by the Court until more than a month after this petition was filed.[7]

Title 28 U. S. C. § 1915 provides that "[a]ny court of the United States *may* authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor." (Emphasis added.) As permitted under this statute, we have adopted Rule 46.1, which provides that "[a] party desiring to proceed in this Court *in forma pauperis* shall file a motion for leave to so proceed, together with his affidavit in the form prescribed in Fed. Rules App. Proc., Form 4 . . . setting forth with particularity facts

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[7] See *In re McDonald*, 488 U. S. 940 (1988) (petition for mandamus and/or prohibition); *In re McDonald*, 484 U. S. 812 (1987) (petition for common law certiorari or habeas corpus); *McDonald* v. *Tennessee*, 475 U. S. 1088, rehearing denied, 475 U. S. 1151 (1986) (petition for certiorari); *In re McDonald*, 479 U. S. 809 (1986) (petition for habeas corpus).

showing that he comes within the statutory requirements." Each year, we permit the vast majority of persons who wish to proceed *in forma pauperis* to do so; last Term, we afforded the privilege of proceeding *in forma pauperis* to about 2,300 persons. Paupers have been an important—and valued—part of the Court's docket, see, *e. g.*, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and remain so.

But paupers filing *pro se* petitions are not subject to the financial considerations—filing fees and attorney's fees—that deter other litigants from filing frivolous petitions. Every paper filed with the Clerk of this Court, no matter how repetitious or frivolous, requires some portion of the institution's limited resources. A part of the Court's responsibility is to see that these resources are allocated in a way that promotes the interests of justice. The continual processing of petitioner's frivolous requests for extraordinary writs does not promote that end. Although we have not done so previously, lower courts have issued orders intended to curb serious abuses by persons proceeding *in forma pauperis*.[8] Our order here prevents petitioner from proceeding *in forma pauperis* when seeking extraordinary writs from the Court.[9] It is perhaps worth noting that we have not granted the sort of extraordinary writ relentlessly sought by petitioner to any litigant—paid or *in forma pauperis*—for at least a decade.

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[8] See, *e. g.*, *Procup* v. *Strickland*, 792 F. 2d 1069 (CA11 1986); *Peck* v. *Hoff*, 660 F. 2d 371 (CA8 1981); *Green* v. *Carlson*, 649 F. 2d 285 (CA5 1981); cf. *In re Martin-Trigona*, 737 F. 2d 1254, 1261 (CA2 1984) ("Federal courts have both the inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions").

[9] Petitioner has repeatedly ignored the letter and spirit of this Court's Rule 26, which provides in part that, "[t]o justify the granting of [an extraordinary writ], it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court."

We have emphasized that extraordinary writs are, not surprisingly, "drastic and extraordinary remedies," to be "reserved for really extraordinary causes," in which "appeal is clearly an inadequate remedy." *Ex parte Fahey*, 332 U. S. 258, 259, 260 (1947).

Petitioner remains free under the present order to file *in forma pauperis* requests for relief other than an extraordinary writ, if he qualifies under this Court's Rule 46 and does not similarly abuse that privilege.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

In the first such act in its almost 200-year history, the Court today bars its door to a litigant prospectively. Jessie McDonald may well have abused his right to file petitions in this Court without payment of the docketing fee; the Court's order documents that fact. I do not agree, however, that he poses such a threat to the orderly administration of justice that we should embark on the unprecedented and dangerous course the Court charts today.

The Court's denial not just of McDonald's present petition but also of his right to file for extraordinary writs *in forma pauperis* in the future is, first of all, of questionable legality. The federal courts are authorized by 28 U. S. C. §1915 to permit filings *in forma pauperis*. The statute is written permissively, but it establishes a comprehensive scheme for the administration of *in forma pauperis* filings. Nothing in it suggests we have any authority to accept *in forma pauperis* pleadings from some litigants but not from others on the basis of how many times they have previously sought our review. Indeed, if anything, the statutory language forecloses the action the Court takes today. Section 1915(d) explains the circumstances in which an *in forma pauperis* pleading may be dismissed as follows: a court "may dismiss *the case* if

the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." (Emphasis added.) This language suggests an individualized assessment of frivolousness or maliciousness that the Court's prospective order precludes. As one lower court has put it, a court's discretion to dismiss *in forma pauperis* cases summarily "is limited . . . in every case by the language of the statute itself which restricts its application to complaints *found to be* frivolous or malicious." *Sills* v. *Bureau of Prisons*, 245 U. S. App. D. C. 389, 391, 761 F. 2d 792, 794 (1985) (emphasis added). Needless to say, the future petitions McDonald is barred from filing have not been "found to be" frivolous. Even a very strong and well-founded belief that McDonald's future filings will be frivolous cannot render a before-the-fact disposition compatible with the individualized determination § 1915 contemplates.

This Court's Rule 46 governs our practice in cases filed *in forma pauperis*. No more than § 1915 does it grant us authority to disqualify a litigant from future use of *in forma pauperis* status. Indeed, Rule 46.4 would seem to forbid such a practice, for it specifies that when the filing requirements described by Rule 46 are complied with, the Clerk "will file" the litigant's papers "and place the case on the docket." Today we order the Clerk to refuse to do just that. Of course we are free to amend our own rules should we see the need to do so, but until we do we are bound by them.

Even if the legality of our action in ordering the Clerk to refuse future petitions for extraordinary writs *in forma pauperis* from this litigant were beyond doubt, I would still oppose it as unwise, potentially dangerous, and a departure from the traditional principle that the door to this courthouse is open to all.

The Court's order purports to be motivated by this litigant's disproportionate consumption of the Court's time and resources. Yet if his filings are truly as repetitious as it appears, it hardly takes much time to identify them as such.

I find it difficult to see how the amount of time and resources required to deal properly with McDonald's petitions could be so great as to justify the step we now take. Indeed, the time that has been consumed in the preparation of the present order barring the door to Mr. McDonald far exceeds that which would have been necessary to process his petitions for the next several years at least. I continue to find puzzling the Court's fervor in ensuring that rights granted to the poor are not abused, even when so doing actually *increases* the drain on our limited resources. Cf. *Brown* v. *Herald Co.*, 464 U. S. 928 (1983) (BRENNAN, J., dissenting). Today's order makes sense as an efficiency measure only if it is merely the prelude to similar orders in regard to other litigants, or perhaps to a generalized rule limiting the number of petitions *in forma pauperis* an individual may file. Therein lies its danger.

The Court's order itself seems to indicate that further measures, at least in regard to this litigant, may be forthcoming. It notes that McDonald remains free to file *in forma pauperis* for relief other than extraordinary writs, if he "does not similarly abuse that privilege." *Ante*, at 185. But if we have found his 19 petitions for extraordinary writs abusive, how long will it be until we conclude that his *33* petitions for certiorari are similarly abusive and bar that door to him as well? I am at a loss to say why, logically, the Court's order is limited to extraordinary writs, and I can only conclude that this order will serve as precedent for similar actions in the future, both as to this litigant and to others.

I doubt—although I am not certain—that any of the petitions Jessie McDonald is now prevented from filing would ultimately have been found meritorious. I am most concerned, however, that if, as I fear, we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim. It is rare, but it does happen on occasion that we grant review and even decide in favor of a litigant who previously had presented multiple unsuc-

cessful petitions on the same issue. See, *e. g.*, *Chessman* v. *Teets*, 354 U. S. 156 (1957); see *id.*, at 173–177 (Douglas, J., dissenting).

This Court annually receives hundreds of petitions, most but not all of them filed *in forma pauperis*, which raise no colorable legal claim whatever, much less a question worthy of the Court's review. Many come from individuals whose mental or emotional stability appears questionable. It does not take us long to identify these petitions as frivolous and to reject them. A certain expenditure of resources is required, but it is not great in relation to our work as a whole. To rid itself of a small portion of this annoyance, the Court now needlessly departs from its generous tradition and improvidently sets sail on a journey whose landing point is uncertain. We have long boasted that our door is open to all. We can no longer.

For the reasons stated in *Brown* v. *Herald Co.*, *supra*, I would deny the petition for a writ of habeas corpus without reaching the merits of the motion to proceed *in forma pauperis*. For the reasons stated above, I dissent from the Court's order directing the Clerk not to accept future petitions *in forma pauperis* for extraordinary writs from this petitioner.

Syllabus

DESHANEY, A MINOR, BY HIS GUARDIAN AD LITEM, ET AL. *v.* WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 87-154. Argued November 2, 1988—Decided February 22, 1989

Petitioner is a child who was subjected to a series of beatings by his father, with whom he lived. Respondents, a county department of social services and several of its social workers, received complaints that petitioner was being abused by his father and took various steps to protect him; they did not, however, act to remove petitioner from his father's custody. Petitioner's father finally beat him so severely that he suffered permanent brain damage and was rendered profoundly retarded. Petitioner and his mother sued respondents under 42 U. S. C. § 1983, alleging that respondents had deprived petitioner of his liberty interest in bodily integrity, in violation of his rights under the substantive component of the Fourteenth Amendment's Due Process Clause, by failing to intervene to protect him against his father's violence. The District Court granted summary judgment for respondents, and the Court of Appeals affirmed.

Held: Respondents' failure to provide petitioner with adequate protection against his father's violence did not violate his rights under the substantive component of the Due Process Clause. Pp. 194–203.

(a) A State's failure to protect an individual against private violence generally does not constitute a violation of the Due Process Clause, because the Clause imposes no duty on the State to provide members of the general public with adequate protective services. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security; while it forbids the State itself to deprive individuals of life, liberty, and property without due process of law, its language cannot fairly be read to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Pp. 194–197.

(b) There is no merit to petitioner's contention that the State's knowledge of his danger and expressions of willingness to protect him against that danger established a "special relationship" giving rise to an affirmative constitutional duty to protect. While certain "special relationships" created or assumed by the State with respect to particular individuals may give rise to an affirmative duty, enforceable through the Due Proc-

ess Clause, to provide adequate protection, see *Estelle* v. *Gamble*, 429 U. S. 97; *Youngberg* v. *Romeo*, 457 U. S. 307, the affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf, through imprisonment, institutionalization, or other similar restraint of personal liberty. No such duty existed here, for the harms petitioner suffered occurred not while the State was holding him in its custody, but while he was in the custody of his natural father, who was in no sense a state actor. While the State may have been aware of the dangers that he faced, it played no part in their creation, nor did it do anything to render him more vulnerable to them. Under these circumstances, the Due Process Clause did not impose upon the State an affirmative duty to provide petitioner with adequate protection. Pp. 197–201.

(c) It may well be that by voluntarily undertaking to provide petitioner with protection against a danger it played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger. But the Due Process Clause does not transform every tort committed by a state actor into a constitutional violation. Pp. 201–202.

812 F. 2d. 298, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 203. BLACKMUN, J., filed a dissenting opinion, *post*, p. 212.

Donald J. Sullivan argued the cause for petitioners. With him on the briefs was *Curry First.*

Mark J. Mingo argued the cause for respondents. With him on the brief were *Wayne M. Yankala* and *Joel I. Klein.*

Deputy Solicitor General Ayer argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Fried, Assistant Attorney General Bolton, Roy T. Englert, Jr., Barbara L. Herwig,* and *John S. Koppel.**

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union Children's Rights Project et al. by *Christopher A. Hansen, Marcia Robinson Lowry, John A. Powell, Steven R. Shapiro,* and

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that this was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sued respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.

I

The facts of this case are undeniably tragic. Petitioner Joshua DeShaney was born in 1979. In 1980, a Wyoming court granted his parents a divorce and awarded custody of Joshua to his father, Randy DeShaney. The father shortly thereafter moved to Neenah, a city located in Winnebago County, Wisconsin, taking the infant Joshua with him. There he entered into a second marriage, which also ended in divorce.

Helen Hershkoff; and for the Massachusetts Committee for Children and Youth by *Laura L. Carroll.*

Briefs urging affirmance were filed for the State of New York et al. by *Robert Abrams*, Attorney General of New York, *O. Peter Sherwood*, Solicitor General, *Peter H. Schiff*, Deputy Solicitor General, and *Michael S. Buskus*, Assistant Attorney General, *Joseph I. Lieberman*, Attorney General of Connecticut, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Dave Frohnmayer*, Attorney General of Oregon, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Donald J. Hanaway*, Attorney General of Wisconsin, and *Charles Hoornstra*, Assistant Attorney General; and for the National Association of Counties et al. by *Benna Ruth Solomon* and *Douglas A. Poe.*

Gwendolyn H. Gregory, *August W. Steinhilber*, and *Thomas A. Shannon* filed a brief for the National School Boards Association as *amicus curiae.*

The Winnebago County authorities first learned that Joshua DeShaney might be a victim of child abuse in January 1982, when his father's second wife complained to the police, at the time of their divorce, that he had previously "hit the boy causing marks and [was] a prime case for child abuse." App. 152–153. The Winnebago County Department of Social Services (DSS) interviewed the father, but he denied the accusations, and DSS did not pursue them further. In January 1983, Joshua was admitted to a local hospital with multiple bruises and abrasions. The examining physician suspected child abuse and notified DSS, which immediately obtained an order from a Wisconsin juvenile court placing Joshua in the temporary custody of the hospital. Three days later, the county convened an ad hoc "Child Protection Team"—consisting of a pediatrician, a psychologist, a police detective, the county's lawyer, several DSS caseworkers, and various hospital personnel—to consider Joshua's situation. At this meeting, the Team decided that there was insufficient evidence of child abuse to retain Joshua in the custody of the court. The Team did, however, decide to recommend several measures to protect Joshua, including enrolling him in a preschool program, providing his father with certain counselling services, and encouraging his father's girlfriend to move out of the home. Randy DeShaney entered into a voluntary agreement with DSS in which he promised to cooperate with them in accomplishing these goals.

Based on the recommendation of the Child Protection Team, the juvenile court dismissed the child protection case and returned Joshua to the custody of his father. A month later, emergency room personnel called the DSS caseworker handling Joshua's case to report that he had once again been treated for suspicious injuries. The caseworker concluded that there was no basis for action. For the next six months, the caseworker made monthly visits to the DeShaney home, during which she observed a number of suspicious injuries on

Joshua's head; she also noticed that he had not been enrolled in school, and that the girlfriend had not moved out. The caseworker dutifully recorded these incidents in her files, along with her continuing suspicions that someone in the DeShaney household was physically abusing Joshua, but she did nothing more. In November 1983, the emergency room notified DSS that Joshua had been treated once again for injuries that they believed to be caused by child abuse. On the caseworker's next two visits to the DeShaney home, she was told that Joshua was too ill to see her. Still DSS took no action.

In March 1984, Randy DeShaney beat 4-year-old Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded. Randy DeShaney was subsequently tried and convicted of child abuse.

Joshua and his mother brought this action under 42 U. S. C. § 1983 in the United States District Court for the Eastern District of Wisconsin against respondents Winnebago County, DSS, and various individual employees of DSS. The complaint alleged that respondents had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known. The District Court granted summary judgment for respondents.

The Court of Appeals for the Seventh Circuit affirmed, 812 F. 2d 298 (1987), holding that petitioners had not made out an actionable § 1983 claim for two alternative reasons. First, the court held that the Due Process Clause of the Fourteenth Amendment does not require a state or local governmental entity to protect its citizens from "private violence, or other

mishaps not attributable to the conduct of its employees." *Id.*, at 301. In so holding, the court specifically rejected the position endorsed by a divided panel of the Third Circuit in *Estate of Bailey by Oare* v. *County of York*, 768 F. 2d 503, 510–511 (1985), and by dicta in *Jensen* v. *Conrad*, 747 F. 2d 185, 190–194 (CA4 1984), cert. denied, 470 U. S. 1052 (1985), that once the State learns that a particular child is in danger of abuse from third parties and actually undertakes to protect him from that danger, a "special relationship" arises between it and the child which imposes an affirmative constitutional duty to provide adequate protection. 812 F. 2d, at 303–304. Second, the court held, in reliance on our decision in *Martinez* v. *California*, 444 U. S. 277, 285 (1980), that the causal connection between respondents' conduct and Joshua's injuries was too attenuated to establish a deprivation of constitutional rights actionable under § 1983. 812 F. 2d, at 301–303. The court therefore found it unnecessary to reach the question whether respondents' conduct evinced the "state of mind" necessary to make out a due process claim after *Daniels* v. *Williams*, 474 U. S. 327 (1986), and *Davidson* v. *Cannon*, 474 U. S. 344 (1986). 812 F. 2d, at 302.

Because of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights, see *Archie* v. *Racine*, 847 F. 2d 1211, 1220–1223, and n. 10 (CA7 1988) (en banc) (collecting cases), cert. pending, No. 88–576, and the importance of the issue to the administration of state and local governments, we granted certiorari. 485 U. S. 958 (1988). We now affirm.

II

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Petition-

ers contend that the State[1] deprived Joshua of his liberty interest in "free[dom] from . . . unjustified intrusions on personal security," see *Ingraham* v. *Wright*, 430 U. S. 651, 673 (1977), by failing to provide him with adequate protection against his father's violence. The claim is one invoking the substantive rather than the procedural component of the Due Process Clause; petitioners do not claim that the State denied Joshua protection without according him appropriate procedural safeguards, see *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972), but that it was categorically obligated to protect him in these circumstances, see *Youngberg* v. *Romeo*, 457 U. S. 307, 309 (1982).[2]

But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.

[1] As used here, the term "State" refers generically to state and local governmental entities and their agents.

[2] Petitioners also argue that the Wisconsin child protection statutes gave Joshua an "entitlement" to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection against state deprivation under our decision in *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564 (1972). Brief for Petitioners 24–29. But this argument is made for the first time in petitioners' brief to this Court: it was not pleaded in the complaint, argued to the Court of Appeals as a ground for reversing the District Court, or raised in the petition for certiorari. We therefore decline to consider it here. See *Youngberg* v. *Romeo*, 457 U. S., at 316, n. 19; *Dothard* v. *Rawlinson*, 433 U. S. 321, 323, n. 1 (1977); *Duignan* v. *United States*, 274 U. S. 195, 200 (1927); *Old Jordan Mining & Milling Co.* v. *Société Anonyme des Mines*, 164 U. S. 261, 264–265 (1896).

Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression," *Davidson* v. *Cannon*, *supra*, at 348; see also *Daniels* v. *Williams*, *supra*, at 331 ("'"to secure the individual from the arbitrary exercise of the powers of government,"'" and "to prevent governmental power from being 'used for purposes of oppression'") (internal citations omitted); *Parratt* v. *Taylor*, 451 U. S. 527, 549 (1981) (Powell, J., concurring in result) (to prevent the "affirmative abuse of power"). Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. See, *e. g.*, *Harris* v. *McRae*, 448 U. S. 297, 317–318 (1980) (no obligation to fund abortions or other medical services) (discussing Due Process Clause of Fifth Amendment); *Lindsey* v. *Normet*, 405 U. S. 56, 74 (1972) (no obligation to provide adequate housing) (discussing Due Process Clause of Fourteenth Amendment); see also *Youngberg* v. *Romeo*, *supra*, at 317 ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border"). As we said in *Harris* v. *McRae:* "Although the liberty protected by the Due Process Clause affords protection against unwarranted *government* interference . . . , it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." 448 U. S., at 317–318 (emphasis added). If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot

be held liable under the Clause for injuries that could have been averted had it chosen to provide them.[3] As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Petitioners contend, however, that even if the Due Process Clause imposes no affirmative obligation on the State to provide the general public with adequate protective services, such a duty may arise out of certain "special relationships" created or assumed by the State with respect to particular individuals. Brief for Petitioners 13–18. Petitioners argue that such a "special relationship" existed here because the State knew that Joshua faced a special danger of abuse at his father's hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger. *Id.*, at 18–20. Having actually undertaken to protect Joshua from this danger—which petitioners concede the State played no part in creating—the State acquired an affirmative "duty," enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, so the argument goes, was an abuse of governmental power that so "shocks the conscience," *Rochin* v. *California*, 342 U. S. 165, 172 (1952), as to constitute a substantive due process violation. Brief for Petitioners 20.[4]

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[3] The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause. See *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886). But no such argument has been made here.

[4] The genesis of this notion appears to lie in a statement in our opinion in *Martinez* v. *California*, 444 U. S. 277 (1980). In that case, we were asked to decide, *inter alia*, whether state officials could be held liable under the Due Process Clause of the Fourteenth Amendment for the death of a private citizen at the hands of a parolee. Rather than squarely confronting the question presented here—whether the Due Process Clause imposed upon the State an affirmative duty to protect—we affirmed the dismissal of the claim on the narrower ground that the causal connection between the state officials' decision to release the parolee from prison and the murder

We reject this argument. It is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals. In *Estelle* v. *Gamble*, 429 U. S. 97 (1976), we recognized that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment's Due Process Clause, *Robinson* v. *California*, 370 U. S. 660 (1962), requires the State to provide adequate medical care to incarcerated prisoners. 429 U. S., at 103–104.[5] We rea-

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was too attenuated to establish a "deprivation" of constitutional rights within the meaning of § 1983. *Id.*, at 284–285. But we went on to say: "[T]he parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger. We need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole. But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law." *Id.*, at 285 (footnote omitted).

Several of the Courts of Appeals have read this language as implying that once the State learns that a third party poses a special danger to an identified victim, and indicates its willingness to protect the victim against that danger, a "special relationship" arises between State and victim, giving rise to an affirmative duty, enforceable through the Due Process Clause, to render adequate protection. See *Estate of Bailey by Oare* v. *County of York*, 768 F. 2d 503, 510–511 (CA3 1985); *Jensen* v. *Conrad*, 747 F. 2d 185, 190–194, and n. 11 (CA4 1984) (dicta), cert. denied, 470 U. S. 1052 (1985)); *Balistreri* v. *Pacifica Police Dept.*, 855 F. 2d 1421, 1425–1426 (CA9 1988). But see, in addition to the opinion of the Seventh Circuit below, *Estate of Gilmore* v. *Buckley*, 787 F. 2d 714, 720–723 (CA1), cert. denied, 479 U. S. 882 (1986); *Harpole* v. *Arkansas Dept. of Human Services*, 820 F. 2d 923, 926–927 (CA8 1987); *Wideman* v. *Shallowford Community Hospital Inc.*, 826 F. 2d 1030, 1034–1037 (CA11 1987).

[5] To make out an Eighth Amendment claim based on the failure to provide adequate medical care, a prisoner must show that the state defendants exhibited "deliberate indifference" to his "serious" medical needs; the mere negligent or inadvertent failure to provide adequate care is not enough. *Estelle* v. *Gamble*, 429 U. S., at 105–106. In *Whitley* v. *Albers*, 475 U. S.

soned that because the prisoner is unable "'by reason of the deprivation of his liberty [to] care for himself,'" it is only "'just'" that the State be required to care for him. *Ibid.*, quoting *Spicer* v. *Williamson*, 191 N. C. 487, 490, 132 S. E. 291, 293 (1926).

In *Youngberg* v. *Romeo*, 457 U. S. 307 (1982), we extended this analysis beyond the Eighth Amendment setting,[6] holding that the substantive component of the Fourteenth Amendment's Due Process Clause requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their "reasonable safety" from themselves and others. *Id.*, at 314–325; see *id.*, at 315, 324 (dicta indicating that the State is also obligated to provide such individuals with "adequate food, shelter, clothing, and medical care"). As we explained: "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed—who may not be punished at all—in unsafe conditions." *Id.*, at 315–316; see also *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239, 244 (1983) (holding that the Due Process Clause requires the responsible government or governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by the police).

But these cases afford petitioners no help. Taken together, they stand only for the proposition that when the State takes a person into its custody and holds him there

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312 (1986), we suggested that a similar state of mind is required to make out a substantive due process claim in the prison setting. *Id.*, at 326–327.

[6] The Eighth Amendment applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions. . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law." *Ingraham* v. *Wright*, 430 U. S. 651, 671–672, n. 40 (1977); see also *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239, 244 (1983); *Bell* v. *Wolfish*, 441 U. S. 520, 535, n. 16 (1979).

against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. See *Youngberg* v. *Romeo*, *supra*, at 317 ("When a person is institutionalized—and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist").[7] The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e. g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. See *Estelle* v. *Gamble*, *supra*, at 103–104; *Youngberg* v. *Romeo*, *supra*, at 315–316. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. See *Estelle* v. *Gamble*, *supra*, at 103 ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met"). In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.[8]

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[7] Even in this situation, we have recognized that the State "has considerable discretion in determining the nature and scope of its responsibilities." *Youngberg* v. *Romeo*, 457 U. S., at 317.

[8] Of course, the protections of the Due Process Clause, both substantive and procedural, may be triggered when the State, by the affirmative acts of its agents, subjects an involuntarily confined individual to deprivations of liberty which are not among those generally authorized by his confinement. See, *e. g.*, *Whitley* v. *Albers*, *supra*, at 326–327 (shooting inmate); *Youngberg* v. *Romeo*, *supra*, at 316 (shackling involuntarily committed

The *Estelle-Youngberg* analysis simply has no applicability in the present case. Petitioners concede that the harms Joshua suffered occurred not while he was in the State's custody, but while he was in the custody of his natural father, who was in no sense a state actor.[9] While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter. Under these circumstances, the State had no constitutional duty to protect Joshua.

It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide

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mental patient); *Hughes* v. *Rowe*, 449 U. S. 5, 11 (1980) (removing inmate from general prison population and confining him to administrative segregation); *Vitek* v. *Jones*, 445 U. S. 480, 491–494 (1980) (transferring inmate to mental health facility).

[9] Complaint ¶ 16, App. 6 ("At relevant times to and until March 8, 1984, [the date of the final beating,] Joshua DeShaney was in the custody and control of Defendant Randy DeShaney"). Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeals have held, by analogy to *Estelle* and *Youngberg*, that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. See *Doe* v. *New York City Dept. of Social Services*, 649 F. 2d 134, 141–142 (CA2 1981), after remand, 709 F. 2d 782, cert. denied *sub nom. Catholic Home Bureau* v. *Doe*, 464 U. S. 864 (1983); *Taylor ex rel. Walker* v. *Ledbetter*, 818 F. 2d 791, 794–797 (CA11 1987) (en banc), cert. pending *Ledbetter* v. *Taylor*, No. 87–521. We express no view on the validity of this analogy, however, as it is not before us in the present case.

him with adequate protection against that danger. See Restatement (Second) of Torts § 323 (1965) (one who undertakes to render services to another may in some circumstances be held liable for doing so in a negligent fashion); see generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts § 56 (5th ed. 1984) (discussing "special relationships" which may give rise to affirmative duties to act under the common law of tort). But the claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation. See *Daniels* v. *Williams*, 474 U. S., at 335–336; *Parratt* v. *Taylor*, 451 U. S., at 544; *Martinez* v. *California*, 444 U. S. 277, 285 (1980); *Baker* v. *McCollan*, 443 U. S. 137, 146 (1979); *Paul* v. *Davis*, 424 U. S. 693, 701 (1976). A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes. But not "all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment." *Daniels* v. *Williams*, *supra*, at 335. Because, as explained above, the State had no constitutional duty to protect Joshua against his father's violence, its failure to do so—though calamitous in hindsight—simply does not constitute a violation of the Due Process Clause.[10]

Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive adequate compensation for the grievous

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[10] Because we conclude that the Due Process Clause did not require the State to protect Joshua from his father, we need not address respondents' alternative argument that the individual state actors lacked the requisite "state of mind" to make out a due process violation. See *Daniels* v. *Williams*, 474 U. S., at 334, n. 3. Similarly, we have no occasion to consider whether the individual respondents might be entitled to a qualified immunity defense, see *Anderson* v. *Creighton*, 483 U. S. 635 (1987), or whether the allegations in the complaint are sufficient to support a § 1983 claim against the county and DSS under *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), and its progeny.

harm inflicted upon them. But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. In defense of them it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.

The people of Wisconsin may well prefer a system of liability which would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

"The most that can be said of the state functionaries in this case," the Court today concludes, "is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." *Ante* this page. Because I believe that this description of respondents' conduct tells only part of the story and that, accordingly, the Constitution itself "dictated a more active role" for respondents in the circumstances presented here, I cannot agree that respondents had no constitutional duty to help Joshua DeShaney.

It may well be, as the Court decides, *ante*, at 194–197, that the Due Process Clause as construed by our prior cases creates no general right to basic governmental services. That,

however, is not the question presented here; indeed, that question was not raised in the complaint, urged on appeal, presented in the petition for certiorari, or addressed in the briefs on the merits. No one, in short, has asked the Court to proclaim that, as a general matter, the Constitution safeguards positive as well as negative liberties.

This is more than a quibble over dicta; it is a point about perspective, having substantive ramifications. In a constitutional setting that distinguishes sharply between action and inaction, one's characterization of the misconduct alleged under § 1983 may effectively decide the case. Thus, by leading off with a discussion (and rejection) of the idea that the Constitution imposes on the States an affirmative duty to take basic care of their citizens, the Court foreshadows—perhaps even preordains—its conclusion that no duty existed even on the specific facts before us. This initial discussion establishes the baseline from which the Court assesses the DeShaneys' claim that, when a State has—"by word and by deed," *ante*, at 197—announced an intention to protect a certain class of citizens and has before it facts that would trigger that protection under the applicable state law, the Constitution imposes upon the State an affirmative duty of protection.

The Court's baseline is the absence of positive rights in the Constitution and a concomitant suspicion of any claim that seems to depend on such rights. From this perspective, the DeShaneys' claim is first and foremost about inaction (the failure, here, of respondents to take steps to protect Joshua), and only tangentially about action (the establishment of a state program specifically designed to help children like Joshua). And from this perspective, holding these Wisconsin officials liable—where the only difference between this case and one involving a general claim to protective services is Wisconsin's establishment and operation of a program to protect children—would seem to punish an effort that we should seek to promote.

I would begin from the opposite direction. I would focus first on the action that Wisconsin *has* taken with respect to Joshua and children like him, rather than on the actions that the State failed to take. Such a method is not new to this Court. Both *Estelle* v. *Gamble*, 429 U. S. 97 (1976), and *Youngberg* v. *Romeo*, 457 U. S. 307 (1982), began by emphasizing that the States had confined J. W. Gamble to prison and Nicholas Romeo to a psychiatric hospital. This initial action rendered these people helpless to help themselves or to seek help from persons unconnected to the government. See *Estelle*, *supra*, at 104 ("[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself"); *Youngberg*, *supra*, at 317 ("When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioners that a duty to provide certain services and care does exist"). Cases from the lower courts also recognize that a State's actions can be decisive in assessing the constitutional significance of subsequent inaction. For these purposes, moreover, actual physical restraint is not the only state action that has been considered relevant. See, *e. g.*, *White* v. *Rochford*, 592 F. 2d 381 (CA7 1979) (police officers violated due process when, after arresting the guardian of three young children, they abandoned the children on a busy stretch of highway at night).

Because of the Court's initial fixation on the general principle that the Constitution does not establish positive rights, it is unable to appreciate our recognition in *Estelle* and *Youngberg* that this principle does not hold true in all circumstances. Thus, in the Court's view, *Youngberg* can be explained (and dismissed) in the following way: "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process

Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." *Ante*, at 200. This restatement of *Youngberg*'s holding should come as a surprise when one recalls our explicit observation in that case that Romeo did not challenge his commitment to the hospital, but instead "argue[d] that he ha[d] a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution; and that petitioners infringed these rights *by failing to provide* constitutionally required conditions of confinement." 457 U. S., at 315 (emphasis added). I do not mean to suggest that "the State's affirmative act of restraining the individual's freedom to act on his own behalf," *ante*, at 200, was irrelevant in *Youngberg;* rather, I emphasize that this conduct would have led to no injury, and consequently no cause of action under § 1983, unless the State then had failed to take steps to protect Romeo from himself and from others. In addition, the Court's exclusive attention to state-imposed restraints of "the individual's freedom to act on his own behalf," *ante*, at 200, suggests that it was the State that rendered Romeo unable to care for himself, whereas in fact—with an I. Q. of between 8 and 10, and the mental capacity of an 18-month-old child, 457 U. S., at 309—he had been quite incapable of taking care of himself long before the State stepped into his life. Thus, the fact of hospitalization was critical in *Youngberg* not because it rendered Romeo helpless to help himself, but because it separated him from other sources of aid that, we held, the State was obligated to replace. Unlike the Court, therefore, I am unable to see in *Youngberg* a neat and decisive divide between action and inaction.

Moreover, to the Court, the only fact that seems to count as an "affirmative act of restraining the individual's freedom to act on his own behalf" is direct physical control. *Ante*, at 200 (listing only "incarceration, institutionalization, [and] other similar restraint of personal liberty" in describing relevant "affirmative acts"). I would not, however, give *Young-*

berg and *Estelle* such a stingy scope. I would recognize, as the Court apparently cannot, that "the State's knowledge of [an] individual's predicament [and] its expressions of intent to help him" can amount to a "limitation . . . on his freedom to act on his own behalf" or to obtain help from others. *Ante*, at 200. Thus, I would read *Youngberg* and *Estelle* to stand for the much more generous proposition that, if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction.

Youngberg and *Estelle* are not alone in sounding this theme. In striking down a filing fee as applied to divorce cases brought by indigents, see *Boddie* v. *Connecticut*, 401 U. S. 371 (1971), and in deciding that a local government could not entirely foreclose the opportunity to speak in a public forum, see, *e. g.*, *Schneider* v. *State*, 308 U. S. 147 (1939); *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496 (1939); *United States* v. *Grace*, 461 U. S. 171 (1983), we have acknowledged that a State's actions—such as the monopolization of a particular path of relief—may impose upon the State certain positive duties. Similarly, *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), and *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), suggest that a State may be found complicit in an injury even if it did not create the situation that caused the harm.

Arising as they do from constitutional contexts different from the one involved here, cases like *Boddie* and *Burton* are instructive rather than decisive in the case before us. But they set a tone equally well established in precedent as, and contradictory to, the one the Court sets by situating the DeShaneys' complaint within the class of cases epitomized by the Court's decision in *Harris* v. *McRae*, 448 U. S. 297 (1980). The cases that I have cited tell us that *Goldberg* v. *Kelly*, 397 U. S. 254 (1970) (recognizing entitlement to welfare under state law), can stand side by side with *Dandridge* v. *Williams*, 397 U. S. 471, 484 (1970) (implicitly rejecting idea that welfare is a fundamental right), and that *Goss* v.

Lopez, 419 U. S. 565, 573 (1975) (entitlement to public education under state law), is perfectly consistent with *San Antonio Independent School Dist.* v. *Rodriguez*, 411 U. S. 1, 29–39 (1973) (no fundamental right to education). To put the point more directly, these cases signal that a State's prior actions may be decisive in analyzing the constitutional significance of its inaction. I thus would locate the DeShaneys' claims within the framework of cases like *Youngberg* and *Estelle*, and more generally, *Boddie* and *Schneider*, by considering the actions that Wisconsin took with respect to Joshua.

Wisconsin has established a child-welfare system specifically designed to help children like Joshua. Wisconsin law places upon the local departments of social services such as respondent (DSS or Department) a duty to investigate reported instances of child abuse. See Wis. Stat. § 48.981(3) (1987–1988). While other governmental bodies and private persons are largely responsible for the reporting of possible cases of child abuse, see § 48.981(2), Wisconsin law channels all such reports to the local departments of social services for evaluation and, if necessary, further action. § 48.981(3). Even when it is the sheriff's office or police department that receives a report of suspected child abuse, that report is referred to local social services departments for action, see § 48.981(3)(a); the only exception to this occurs when the reporter fears for the child's *immediate* safety. § 48.981(3)(b). In this way, Wisconsin law invites—indeed, directs—citizens and other governmental entities to depend on local departments of social services such as respondent to protect children from abuse.

The specific facts before us bear out this view of Wisconsin's system of protecting children. Each time someone voiced a suspicion that Joshua was being abused, that information was relayed to the Department for investigation and possible action. When Randy DeShaney's second wife told the police that he had "'hit the boy causing marks and [was] a prime case for child abuse,'" the police referred her

complaint to DSS. *Ante*, at 192. When, on three separate occasions, emergency room personnel noticed suspicious injuries on Joshua's body, they went to DSS with this information. *Ante*, at 192–193. When neighbors informed the police that they had seen or heard Joshua's father or his father's lover beating or otherwise abusing Joshua, the police brought these reports to the attention of DSS. App. 144–145. And when respondent Kemmeter, through these reports and through her own observations in the course of nearly 20 visits to the DeShaney home, *id.*, at 104, compiled growing evidence that Joshua was being abused, that information stayed within the Department—chronicled by the social worker in detail that seems almost eerie in light of her failure to act upon it. (As to the extent of the social worker's involvement in, and knowledge of, Joshua's predicament, her reaction to the news of Joshua's last and most devastating injuries is illuminating: "'I just knew the phone would ring some day and Joshua would be dead.'" 812 F. 2d 298, 300 (CA7 1987).)

Even more telling than these examples is the Department's control over the decision whether to take steps to protect a particular child from suspected abuse. While many different people contributed information and advice to this decision, it was up to the people at DSS to make the ultimate decision (subject to the approval of the local government's corporation counsel) whether to disturb the family's current arrangements. App. 41, 58. When Joshua first appeared at a local hospital with injuries signaling physical abuse, for example, it was DSS that made the decision to take him into temporary custody for the purpose of studying his situation—and it was DSS, acting in conjunction with the corporation counsel, that returned him to his father. *Ante*, at 192. Unfortunately for Joshua DeShaney, the buck effectively stopped with the Department.

In these circumstances, a private citizen, or even a person working in a government agency other than DSS, would doubtless feel that her job was done as soon as she had re-

ported her suspicions of child abuse to DSS. Through its child-welfare program, in other words, the State of Wisconsin has relieved ordinary citizens and governmental bodies other than the Department of any sense of obligation to do anything more than report their suspicions of child abuse to DSS. If DSS ignores or dismisses these suspicions, no one will step in to fill the gap. Wisconsin's child-protection program thus effectively confined Joshua DeShaney within the walls of Randy DeShaney's violent home until such time as DSS took action to remove him. Conceivably, then, children like Joshua are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs.

It simply belies reality, therefore, to contend that the State "stood by and did nothing" with respect to Joshua. *Ante*, at 203. Through its child-protection program, the State actively intervened in Joshua's life and, by virtue of this intervention, acquired ever more certain knowledge that Joshua was in grave danger. These circumstances, in my view, plant this case solidly within the tradition of cases like *Youngberg* and *Estelle*.

It will be meager comfort to Joshua and his mother to know that, if the State had "selectively den[ied] its protective services" to them because they were "disfavored minorities," *ante*, at 197, n. 3, their § 1983 suit might have stood on sturdier ground. Because of the posture of this case, we do not know why respondents did not take steps to protect Joshua; the Court, however, tells us that their reason is irrelevant so long as their inaction was not the product of invidious discrimination. Presumably, then, if respondents decided not to help Joshua because his name began with a "J," or because he was born in the spring, or because they did not care enough about him even to formulate an intent to discriminate against him based on an arbitrary reason, respondents would not be liable to the DeShaneys because they were not the ones who dealt the blows that destroyed Joshua's life.

I do not suggest that such irrationality was at work in this case; I emphasize only that we do not know whether or not it was. I would allow Joshua and his mother the opportunity to show that respondents' failure to help him arose, not out of the sound exercise of professional judgment that we recognized in *Youngberg* as sufficient to preclude liability, see 457 U. S., at 322–323, but from the kind of arbitrariness that we have in the past condemned. See, *e. g.*, *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986) (purpose of Due Process Clause was "to secure the individual from the arbitrary exercise of the powers of government" (citations omitted)); *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399 (1937) (to sustain state action, the Court need only decide that it is not "arbitrary or capricious"); *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 389 (1926) (state action invalid where it "passes the bounds of reason and assumes the character of a merely arbitrary fiat," quoting *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 204 (1912)).

Youngberg's deference to a decisionmaker's professional judgment ensures that once a caseworker has decided, on the basis of her professional training and experience, that one course of protection is preferable for a given child, or even that no special protection is required, she will not be found liable for the harm that follows. (In this way, *Youngberg*'s vision of substantive due process serves a purpose similar to that served by adherence to procedural norms, namely, requiring that a state actor stop and think before she acts in a way that may lead to a loss of liberty.) Moreover, that the Due Process Clause is not violated by merely negligent conduct, see *Daniels*, *supra*, and *Davidson* v. *Cannon*, 474 U. S. 344 (1986), means that a social worker who simply makes a mistake of judgment under what are admittedly complex and difficult conditions will not find herself liable in damages under § 1983.

As the Court today reminds us, "the Due Process Clause of the Fourteenth Amendment was intended to prevent govern-

ment 'from abusing [its] power, or employing it as an instrument of oppression.'" *Ante*, at 196, quoting *Davidson*, *supra*, U. S., at 348. My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it. Today's opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent. Because I cannot agree that our Constitution is indifferent to such indifference, I respectfully dissent.

JUSTICE BLACKMUN, dissenting.

Today, the Court purports to be the dispassionate oracle of the law, unmoved by "natural sympathy." *Ante*, at 202. But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts. As JUSTICE BRENNAN demonstrates, the facts here involve not mere passivity, but active state intervention in the life of Joshua DeShaney—intervention that triggered a fundamental duty to aid the boy once the State learned of the severe danger to which he was exposed.

The Court fails to recognize this duty because it attempts to draw a sharp and rigid line between action and inaction. But such formalistic reasoning has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment. Indeed, I submit that these Clauses were designed, at least in part, to undo the formalistic legal reasoning that infected antebellum jurisprudence, which the late Professor Robert Cover analyzed so effectively in his significant work entitled Justice Accused (1975).

Like the antebellum judges who denied relief to fugitive slaves, see *id.*, at 119–121, the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. On the contrary, the question presented by this case

is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging. Cf. A. Stone, Law, Psychiatry, and Morality 262 (1984) ("We will make mistakes if we go forward, but doing nothing can be the worst mistake. What is required of us is moral ambition. Until our composite sketch becomes a true portrait of humanity we must live with our uncertainty; we will grope, we will struggle, and our compassion may be our only guide and comfort").

Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, *ante*, at 193, "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about "liberty and justice for all"—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded. Joshua and his mother, as petitioners here, deserve—but now are denied by this Court—the opportunity to have the facts of their case considered in the light of the constitutional protection that 42 U. S. C. § 1983 is meant to provide.

EU, SECRETARY OF STATE OF CALIFORNIA, ET AL. *v.* SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87–1269. Argued December 5, 1988—Decided February 22, 1989

Section 11702 of the California Elections Code (Code) forbids the official governing bodies of political parties to endorse or oppose candidates in primary elections, while § 29430 makes it a misdemeanor for any candidate in a primary to claim official party endorsement. Other Code sections dictate the organization and composition of parties' governing bodies, limit the term of office for a party's state central committee chair, and require that the chair rotate between residents of northern and southern California. Various party governing bodies, members of such bodies, and other politically active groups and individuals brought suit in the District Court, claiming, *inter alia*, that these Code provisions deprived parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments. The District Court granted summary judgment for the plaintiffs as to the provisions in question, and the Court of Appeals affirmed.

Held: The challenged California election laws are invalid, since they burden the First Amendment rights of political parties and their members without serving a compelling state interest. Pp. 222–233.

(a) The ban on primary endorsements in §§ 11702 and 29430 violates the First and Fourteenth Amendments. By preventing a party's governing body from stating whether a candidate adheres to the party's tenets or whether party officials believe that the candidate is qualified for the position sought, the ban directly hampers the party's ability to spread its message and hamstrings voters seeking to inform themselves about the candidates and issues, and thereby burdens the core right to free political speech of the party and its members. The ban also infringes a party's protected freedom of association rights to identify the people who constitute the association and to select a standard-bearer who best represents the party's ideology and preferences, by preventing the party from promoting candidates at the crucial primary election juncture. Moreover, the ban does not serve a compelling governmental interest. The State has not adequately explained how the ban advances its claimed interest in a stable political system or what makes California so peculiar that it is virtually the only State to determine that such a ban

is necessary. The explanation that the State's compelling interest in stable government embraces a similar interest in party stability is untenable, since a State may enact laws to prevent disruption of political parties from without but not from within. The claim that a party that issues primary endorsements risks intraparty friction which may endanger its general election prospects is insufficient, since the goal of protecting the party against itself would not justify a State's substituting its judgment for that of the party. The State's claim that the ban is necessary to protect primary voters from confusion and undue influence must be viewed with skepticism, since the ban restricts the flow of information to the citizenry without any evidence of the existence of fraud or corruption that would justify such a restriction. Pp. 222–229.

(b) The restrictions on the organization and composition of the official governing bodies of political parties, the limits on the term of office for state central committee chairs, and the requirement that such chairs rotate between residents of northern and southern California cannot be upheld. These laws directly burden the associational rights of a party and its members by limiting the party's discretion in how to organize itself, conduct its affairs, and select its leaders. Moreover, the laws do not serve a compelling state interest. A State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure that elections are orderly, fair, and honest, and California has made no such showing. The State's claim that it has a compelling interest in the democratic management of internal party affairs is without merit, since this is not a case where intervention is necessary to prevent the derogation of party adherents' civil rights, and since the State has no interest in protecting the party's integrity against the party itself. Nor are the restrictions justified by the State's claim that limiting the term of the state central committee chair and requiring that the chair rotate between northern and southern California help to prevent regional friction from reaching a critical mass, since a State cannot substitute its judgment for that of the party as to the desirability of a particular party structure. Pp. 229–233.

826 F. 2d 814, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all other Members joined, except REHNQUIST, C. J., who took no part in the consideration or decision of the case. STEVENS, J., filed a concurring opinion, *post*, p. 233.

Geoffrey L. Graybill, Jr., Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *John K. Van de Kamp*, Attorney General, *Rich-*

ard D. Martland, Chief Assistant Attorney General, and *N. Eugene Hill*, Assistant Attorney General.

James J. Brosnahan argued the cause for appellees. With him on the brief was *Cedric C. Chao.**

JUSTICE MARSHALL delivered the opinion of the Court.

The California Elections Code prohibits the official governing bodies of political parties from endorsing candidates in party primaries. It also dictates the organization and composition of those bodies, limits the term of office of a party chair, and requires that the chair rotate between residents of northern and southern California. The Court of Appeals for the Ninth Circuit held that these provisions violate the free speech and associational rights of political parties and their members guaranteed by the First and Fourteenth Amendments. 826 F. 2d 814 (1987). We noted probable jurisdiction, 485 U. S. 1004 (1988), and now affirm.

I

A

The State of California heavily regulates its political parties. Although the laws vary in extent and detail from party to party, certain requirements apply to all "ballot-qualified" parties.[1] The California Elections Code (Code) provides that the "official governing bodies" for such a party are its "state convention," "state central committee," and "county central committees," Cal. Elec. Code Ann. § 11702 (West

**Stuart R. Blatt* filed a brief for the Libertarian National Committee as *amicus curiae*.

[1] A "ballot-qualified" party is eligible to participate in any primary election because: (a) during the last gubernatorial election one of its candidates for state-wide office received two percent of the vote; (b) one percent of the State's voters are registered with the party; or (c) a petition establishing the party has been filed by ten percent of the State's voters. Cal. Elec. Code Ann. § 6430 (West 1977).

In the interest of simplicity, we use the terms "ballot-qualified party" and "political party" interchangeably.

1977), and that these bodies are responsible for conducting the party's campaigns.[2] At the same time, the Code provides that the official governing bodies "shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election." *Ibid.* It is a misdemeanor for any primary candidate, or a person on her behalf, to claim that she is the officially endorsed candidate of the party. § 29430.

Although the official governing bodies of political parties are barred from issuing endorsements, other groups are not. Political clubs affiliated with a party, labor organizations, political action committees, other politically active associations, and newspapers frequently endorse primary candidates.[3] With the official party organizations silenced by the ban, it has been possible for a candidate with views antithetical to those of her party nevertheless to win its primary.[4]

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[2] The Code requires the state central committee of each party to conduct campaigns for the party, employ campaign directors, and develop whatever campaign organizations serve the best interests of the party. Cal. Elec. Code Ann. § 8776 (West Supp. 1989) (Democratic Party); § 9276 (Republican Party); § 9688 (American Independent Party); § 9819 (Peace and Freedom Party). The county central committees, in turn, "have charge of the party campaign under general direction of the state central committee." § 8940 (Democratic Party); § 9440 (Republican Party); § 9740 (American Independent Party); § 9850 (Peace and Freedom Party). In addition, they "perform such other duties and services for th[e] political party as seem to be for the benefit of the party." § 8942 (Democratic Party); § 9443 (Republican Party); § 9742 (American Independent Party); § 9852 (Peace and Freedom Party).

[3] For example, while voters cannot learn what the Democratic state and county central committees think of candidates, they may be flooded with endorsements from disparate groups across the State such as the Berkeley Democratic Club, the Muleskinners Democratic Club, and the District 8 Democratic Club. Addendum to Motion to Affirm or to Dismiss 39a ¶ 7 (Addendum) (declaration of Mary King, chair of the Alameda County Democratic Central Committee); Addendum 48 ¶ 7 (declaration of Linda Post, chair of San Francisco County Democratic Central Committee).

[4] In 1980, for example, Tom Metzger won the Democratic Party's nomination for United States House of Representative from the San Diego area,

In addition to restricting the primary activities of the official governing bodies of political parties, California also regulates their internal affairs. Separate statutory provisions dictate the size and composition of the state central committees;[5] set forth rules governing the selection and removal of committee members;[6] fix the maximum term of office for the chair of the state central committee;[7] require that the chair rotate between residents of northern and southern California;[8] specify the time and place of committee meetings;[9] and

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although he was a Grand Dragon of the Ku Klux Klan and held views antithetical to those of the Democratic Party. Addendum 15a ¶ 2 (declaration of Edmond Costantini, member of the Executive Board of the Democratic state central committee).

[5] For example, the Code dictates the precise mix of elected officials, party nominees, and party activists who are members of the state central committees of the Republican and Democratic Parties as well as who may nominate the various committee members. Cal. Elec. Code Ann. §§ 8660, 8661, 8663 (West 1977 and Supp. 1989) (Democratic Party); §§ 9160–9164 (Republican Party). Other parties are similarly regulated. See § 9640 (American Independent Party); §§ 9762, 9765 (Peace and Freedom Party).

[6] §§ 8663–8667, 8669 (Democratic Party); §§ 9161–9164, 9168, 9170 (Republican Party); §§ 9641–9644, 9648–9650 (West 1977) (American Independent Party); §§ 9790–9794 (West 1977 and Supp. 1989) (Peace and Freedom Party).

[7] The Code limits the term of office of the chair of the state central committee to two years and prohibits successive terms. See § 8774 (West Supp. 1989) (Democratic Party); § 9274 (West 1977) (Republican Party); § 9685 (American Independent Party); § 9816 (West 1977 and Supp. 1989) (Peace and Freedom Party).

[8] § 8774 (West Supp. 1989) (Democratic state central committee); § 9274 (West 1977) (Republican state central committee); § 9816 (West 1977 and Supp. 1989) (Peace and Freedom state central committee).

[9] §§ 8710, 8711 (West Supp. 1989) (Democratic state central committee); §§ 8920, 8921 (West 1977 and Supp. 1989) (Democratic county central committee); § 9210 (West Supp. 1989) (Republican state central committee); §§ 9420–9421 (West 1977 and Supp. 1989) (Republican county central committee); §§ 9730–9732 (American Independent county central committee); § 9800 (West 1977) (Peace and Freedom state central committee); §§ 9830, 9840–9842 (Peace and Freedom county central committee).

limit the dues parties may impose on members.[10] Violations of these provisions are criminal offenses punishable by fine and imprisonment.

B

Various county central committees of the Democratic and Republican Parties, the state central committee of the Libertarian Party, members of various state and county central committees, and other groups and individuals active in partisan politics in California brought this action in federal court against state officials responsible for enforcing the Code (State or California).[11] They contended that the ban on primary endorsements and the restrictions on internal party governance deprive political parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments of the United States Constitution.[12] The first count of the complaint challenged the ban on endorsements in partisan primary elections; the second count challenged the ban on endorsements in nonpartisan school, county, and municipal elections; and the third count challenged the provisions that prescribe the composition of state central committees, the term of office and eligibility criteria for state central committee chairs, the time and place of state and county central committee meetings, and the dues county committee members must pay.

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[10] §§ 8775, 8945 (West 1977 and Supp. 1989) (Democratic Party); § 9275 (Republican Party); §§ 9687, 9745 (West 1977) (American Independent Party); §§ 9818, 9855 (Peace and Freedom Party).

[11] The plaintiffs sued March Fong Eu, Secretary of State of California; John K. Van de Kamp, Attorney General of California; Arlo Smith, District Attorney of San Francisco County; and Leo Himmelsbach, District Attorney of Santa Clara County.

[12] The plaintiffs also asserted that the statutes violated the Equal Protection Clause of the Fourteenth Amendment. Because the District Court held that the statutes violate the First Amendment, it did not reach this claim.

The plaintiffs moved for summary judgment, in support of which they filed 28 declarations from the chairs of each plaintiff central committee, prominent political scientists, and elected officials from California and other States. The State moved to dismiss and filed a cross-motion for summary judgment supported by one declaration from a former state senator.

The District Court granted summary judgment for the plaintiffs on the first count, ruling that the ban on primary endorsements in §§ 11702 and 29430 violated the First Amendment as applied to the States through the Fourteenth Amendment. The court stayed all proceedings on the second count under the abstention doctrine of *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496 (1941).[13] On the third count, the court ruled that the laws prescribing the composition of state central committees, limiting the committee chairs' terms of office, and designating that the chair rotate between residents of northern and southern California violate the First Amendment.[14] The court denied summary judgment with respect to the statutory provisions establish-

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[13] An appeal was then pending in the California Supreme Court presenting a First Amendment challenge to a ban on endorsements by political parties of candidates in nonpartisan school, county, and municipal elections. The California Supreme Court ultimately decided that the Code did not prohibit such endorsements and so did not reach the First Amendment question. *Unger* v. *Superior Court*, 37 Cal. 3d 612, 692 P. 2d 238 (1984). A ban on party endorsements in nonpartisan elections subsequently was enacted by ballot initiative. A Federal District Court has ruled that this ban violates the First and Fourteenth Amendments. *Geary* v. *Renne*, 708 F. Supp. 278 (ND Cal.), stayed, 856 F. 2d 1456 (CA9 1988).

[14] The District Court invalidated the following Code sections: Cal. Elec. Code §§ 8660, 8661, 8663–8667, 8669 (West 1977 and Supp. 1989) (Democratic state central committee); §§ 9160, 9160.5, 9161, 9161.5, 9162–9164 (Republican state central committee); § 9274 (West 1977) (Republican state central committee chair); and § 9816 (West 1977 and Supp. 1989) (Peace and Freedom state central committee chair). In addition, it held that § 29102 (West 1977) was unconstitutional as applied.

ing the time and place of committee meetings and the amount of dues. Civ. No. C–83–5599 MHP (ND Cal., May 3, 1984).

The Court of Appeals for the Ninth Circuit affirmed. 792 F. 2d 802 (1986). This Court vacated that decision, 479 U. S. 1024 (1987), and remanded for further consideration in light of *Tashjian* v. *Republican Party of Connecticut*, 479 U. S. 208 (1986).

After supplemental briefing, the Court of Appeals again affirmed. 826 F. 2d 814 (1987). The court first rejected the State's arguments based on nonjusticiability, lack of standing, Eleventh Amendment immunity, and *Pullman* abstention. 826 F. 2d, at 821–825. Turning to the merits, the court characterized the prohibition on primary endorsements as an "outright ban" on political speech. *Id.*, at 833. "Prohibiting the governing body of a political party from supporting some candidates and opposing others patently infringes both the right of the party to express itself freely and the right of party members to an unrestricted flow of political information." *Id.*, at 835. The court rejected the State's argument that the ban served a compelling state interest in preventing internal party dissension and factionalism: "The government simply has no legitimate interest in protecting political parties from disruptions of their own making." *Id.*, at 834. The court noted, moreover, that the State had not shown that banning primary endorsements protects parties from factionalism. *Ibid.* The court concluded that the ban was not necessary to protect voters from confusion, stating, "California's ban on preprimary endorsements is a form of paternalism that is inconsistent with the First Amendment." *Id.*, at 836.

The Court of Appeals also found that California's regulation of internal party affairs "burdens the parties' right to govern themselves as they think best." *Id.*, at 827. This interference with the parties' and their members' First Amendment rights was not justified by a compelling state interest, for a State has a legitimate interest "in orderly elec-

tions, not orderly parties." *Id.*, at 831. In any event, the court noted, the State had failed to submit "'a shred of evidence,'" *id.*, at 833 (quoting Civ. No. C–83–5599 (ND Cal., May 3, 1984)), that the regulations of party internal affairs helped minimize party factionalism. Accordingly, the court held that the challenged provisions were unconstitutional under the First and Fourteenth Amendments.

II

A State's broad power to regulate the time, place, and manner of elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian* v. *Republican Party of Connecticut*, 479 U. S., at 217. To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. *Id.*, at 214; *Anderson* v. *Celebrezze*, 460 U. S. 780, 789 (1983). If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, *Tashjian*, *supra*, at 217, 222; *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 184 (1979); *American Party of Texas* v. *White*, 415 U. S. 767, 780, and n. 11 (1974); *Williams* v. *Rhodes*, 393 U. S. 23, 31 (1968), and is narrowly tailored to serve that interest, *Illinois Bd. of Elections*, *supra*, at 185; *Kusper* v. *Pontikes*, 414 U. S. 51, 58–59 (1973); *Dunn* v. *Blumstein*, 405 U. S. 330, 343 (1972).

A

We first consider California's prohibition on primary endorsements by the official governing bodies of political parties. California concedes that its ban implicates the First Amendment, Tr. of Oral Arg. 17, but contends that the burden is "miniscule." *Id.*, at 7. We disagree. The ban directly affects speech which "is at the core of our electoral

process and of the First Amendment freedoms." *Williams* v. *Rhodes*, *supra*, at 32. We have recognized repeatedly that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976) *(per curiam);* see also *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 913 (1982); *Carey* v. *Brown*, 447 U. S. 455, 467 (1980); *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). Indeed, the First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office. *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 272 (1971); see also *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966). Free discussion about candidates for public office is no less critical before a primary than before a general election. Cf. *Storer* v. *Brown*, 415 U. S. 724, 735 (1974); *Smith* v. *Allwright*, 321 U. S. 649, 666 (1944); *United States* v. *Classic*, 313 U. S. 299, 314 (1941). In both instances, the "election campaign is a means of disseminating ideas as well as attaining political office." *Illinois Bd. of Elections*, *supra*, at 186.

California's ban on primary endorsements, however, prevents party governing bodies from stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought. This prohibition directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues. See *Tashjian*, *supra*, at 220–222; *Pacific Gas & Electric Co.* v. *Public Utilities Comm'n of California*, 475 U. S. 1, 8 (1986); *Brown* v. *Hartlage*, 456 U. S. 45, 60 (1982); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 791–792 (1978). A "highly paternalistic approach" limiting what people may hear is generally suspect, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425

U. S. 748, 770 (1976); see also *First National Bank of Boston*, *supra*, at 790–792, but it is particularly egregious where the State censors the political speech a political party shares with its members. See *Roberts* v. *United States Jaycees*, 468 U. S. 609, 634 (1984) (O'CONNOR, J., concurring).

Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association. It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. *Tashjian*, *supra*, at 214; see also *Elrod* v. *Burns*, 427 U. S. 347, 357 (1976) (plurality opinion). Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, *Tashjian*, *supra*, at 214 (quoting *Kusper*, *supra*, at 57), but also that a political party has a right to "'identify the people who constitute the association,'" *Tashjian*, *supra*, at 214 (quoting *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 122 (1981)); cf. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 460–462 (1958), and to select a "standard bearer who best represents the party's ideologies and preferences." *Ripon Society, Inc.* v. *National Republican Party*, 173 U. S. App. D. C. 350, 384, 525 F. 2d 567, 601 (1975) (Tamm, J., concurring in result), cert. denied, 424 U. S. 933 (1976).

Depriving a political party of the power to endorse suffocates this right. The endorsement ban prevents parties from promoting candidates "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian*, *supra*, at 216. Even though individual members of the state central committees and county central committees are free to issue endorsements, imposing limita-

tions "on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U. S. 290, 296 (1981).

Because the ban burdens appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest.[15] The

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[15] California contends that it need not show that its endorsement ban serves a compelling state interest because the political parties have "consented" to it. In support of this claim, California observes that the legislators who could repeal the ban belong to political parties, that the bylaws of some parties prohibit primary endorsements, and that parties continue to participate in state-run primaries.

This argument is fatally flawed in several respects. We have never held that a political party's consent will cure a statute that otherwise violates the First Amendment. Even aside from this fundamental defect, California's consent argument is contradicted by the simple fact that the official governing bodies of various political parties have joined this lawsuit. In addition, the Democratic and Libertarian Parties moved to issue endorsements following the Court of Appeals' invalidation of the endorsement ban.

There are other flaws in the State's argument. Simply because a legislator belongs to a political party does not make her at all times a representative of party interests. In supporting the endorsement ban, an individual legislator may be acting on her understanding of the public good or her interest in reelection. The independence of legislators from their parties is illustrated by the California Legislature's frequent refusal to amend the election laws in accordance with the wishes of political parties. See, *e. g.*, Addendum 12a–13a ¶¶ 7–9 (declaration of Bert Coffey, chair of the Democratic state central committee). Moreover, the State's argument ignores those parties with negligible, if any, representation in the legislature.

That the bylaws of some parties prohibit party primary endorsements also does not prove consent. These parties may have chosen to reflect state election law in their bylaws, rather than permit or require conduct prohibited by law. Nor does the fact that parties continue to participate in the state-run primary process indicate that they favor each regulation imposed upon that process. A decision to participate in state-run primaries more likely reflects a party's determination that ballot participation is more advantageous than the alternatives, that is, supporting independent candidates or conducting write-in campaigns. See *Storer* v. *Brown*, 415

State offers two: stable government and protecting voters from confusion and undue influence.[16] Maintaining a stable political system is, unquestionably, a compelling state interest. See *Storer* v. *Brown*, 415 U. S., at 736. California, however, never adequately explains how banning parties from endorsing or opposing primary candidates advances that interest. There is no showing, for example, that California's political system is any more stable now than it was in 1963, when the legislature enacted the ban. Nor does the State explain what makes the California system so peculiar that it is virtually the only State that has determined that such a ban is necessary.[17]

U. S. 724, 745 (1974); *Anderson* v. *Celebrezze*, 460 U. S. 780, 799, n. 26 (1983).

Finally, the State's focus on the parties' alleged consent ignores the independent First Amendment rights of the parties' members. It is wholly undemonstrated that the members authorized the parties to consent to infringements of members' rights.

[16] The State also claims that the ban on primary endorsements serves a compelling state interest in "'confining each voter to a single nominating act.'" *Tashjian* v. *Republican Party of Connecticut*, 479 U. S. 208, 225, n. 13 (1986) (quoting *Anderson*, *supra*, at 802, n. 29). This argument is meritless. It fails to distinguish between a nominating act—the vote cast at the primary election—and speech that may influence that act. The logic of the State's argument not only would support a ban on endorsements by every organization and individual, but also would justify a total ban on all discussion of a candidate's qualifications and political positions. Such a blanket prohibition cannot coexist with the constitutional protection of political speech.

The State's claim that the endorsement ban is necessary to serve any compelling state interest is called into question by its argument before the District Court and the Court of Appeals that this action is not justiciable because the State has never enforced the challenged election laws. 826 F. 2d 814, 821 (1987).

[17] New Jersey also bans primary endorsements by political parties. N. J. Stat. Ann. § 19:34–52 (West 1964); see Weisburd, Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods, 57 S. Cal. L. Rev. 213, 271–272, n. 343 (1984). Florida's statutory ban on primary endorsements by political parties was held to violate the First Amendment. See *Abrams* v. *Reno*, 452 F. Supp. 1166,

The only explanation the State offers is that its compelling interest in stable government embraces a similar interest in party stability. Brief for Appellants 47. The State relies heavily on *Storer* v. *Brown*, *supra*, where we stated that because "splintered parties and unrestrained factionalism may do significant damage to the fabric of government," 415 U. S., at 736, States may regulate elections to ensure that "some sort of order, rather than chaos . . . accompan[ies] the democratic processes," *id.*, at 730. Our decision in *Storer*, however, does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism during a primary campaign. To the contrary, *Storer* recognized that "contending forces within the party employ the primary campaign and the primary election to finally settle their differences." *Id.*, at 735. A primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them. *Ibid.*; *American Party of Texas* v. *White*, 415 U. S., at 781. *Tashjian* recognizes precisely this distinction. In that case, we noted that a State may enact laws to "prevent the disruption of the political parties from without" but not, as in this case, laws "to prevent the parties from taking internal steps affecting their own process for the selection of candidates." 479 U. S., at 224.

It is no answer to argue, as does the State, that a party that issues primary endorsements risks intraparty friction which may endanger the party's general election prospects. Presumably a party will be motivated by self-interest and not engage in acts or speech that run counter to its political success. However, even if a ban on endorsements saves a political party from pursuing self-destructive acts, that would

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1171–1172 (SD Fla. 1978), aff'd, 649 F. 2d 342 (CA5 1981), cert. denied, 455 U. S. 1016 (1982). Several States provide formal procedures for party primary endorsements. See, *e. g.*, Conn. Gen. Stat. § 9–390 (1967 and Supp. 1988); R. I. Gen. Laws § 17–12–4 (1988); see also Advisory Commission on Intergovernmental Relations, The Transformation in American Politics: Implications for Federalism 148 (1986).

not justify a State substituting its judgment for that of the party. See *ibid.*; *Democratic Party of United States*, 450 U. S., at 124. Because preserving party unity during a primary is not a compelling state interest, we must look elsewhere to justify the challenged law.

The State's second justification for the ban on party endorsements and statements of opposition is that it is necessary to protect primary voters from confusion and undue influence. Certainly the State has a legitimate interest in fostering an informed electorate. *Tashjian*, *supra*, at 220; *Anderson* v. *Celebrezze*, 460 U. S., at 796; *American Party of Texas* v. *White*, *supra*, at 782, n. 14; *Bullock* v. *Carter*, 405 U. S. 134, 145 (1972); *Jenness* v. *Fortson*, 403 U. S. 431, 442 (1971). However, "'[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.'" *Tashjian*, *supra*, at 221 (quoting *Anderson* v. *Celebrezze*, *supra*, at 798).[18] While a State may regulate the

[18] It is doubtful that the silencing of official party committees, alone among the various groups interested in the outcome of a primary election, is the key to protecting voters from confusion. Indeed, the growing number of endorsements by political organizations using the labels "Democratic" or "Republican" has likely misled voters into believing that the official governing bodies were supporting the candidates.

The State makes no showing, moreover, that voters are unduly influenced by party endorsements. There is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or a labor union. In States where parties are permitted to issue primary endorsements, voters may consider the parties' views on the candidates but still exercise independent judgment when casting their vote. For example, in the 1982 New York Democratic gubernatorial contest, Mario Cuomo won the primary over Edward Koch, who had been endorsed by the party. That year gubernatorial candidates endorsed by their parties also lost the primary election to nonendorsed candidates in Massachusetts and Minnesota. Even where the party-endorsed candidate wins the primary, one study has concluded that the party endorsement has little, if any effect, on the way voters cast their vote. App. 97–98 ¶¶ 10, 14–17 (declaration of Malcolm E. Jewell, Professor of Political Science, University of Kentucky).

flow of information between political associations and their members when necessary to prevent fraud and corruption, see *Buckley* v. *Valeo*, 424 U. S., at 26–27; *Jenness* v. *Fortson*, *supra*, at 442, there is no evidence that California's ban on party primary endorsements serves that purpose.[19]

Because the ban on primary endorsements by political parties burdens political speech while serving no compelling governmental interest, we hold that §§ 11702 and 29430 violate the First and Fourteenth Amendments.

B

We turn next to California's restrictions on the organization and composition of official governing bodies, the limits on the term of office for state central committee chair, and the requirement that the chair rotate between residents of northern and southern California. These laws directly implicate the associational rights of political parties and their members. As we noted in *Tashjian*, a political party's "determination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution." 479 U. S., at 224. Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders. See *Democratic Party of United States*, *supra* (State cannot dictate process of selecting state delegates to Democratic National Convention);

[19] The State suggested at oral argument that the endorsement ban prevents fraud by barring party officials from misrepresenting that they speak for the party. To the extent that the State suggests that only the primary election results can constitute a party endorsement, Tr. of Oral Arg. 8–9, it confuses an endorsement from the official governing bodies that may influence election results with the results themselves. To the extent that the State is claiming that the appellees are not authorized to represent the official party governing bodies and their members, the State simply is reasserting its standing claim, which the District Court rejected. Civ. No. C–83–5599 (ND Cal., June 1, 1984) ("[T]he plaintiff central committees . . . have authorization and capacity to bring and maintain this litigation"). The Court of Appeals did not disturb this ruling, 826 F. 2d, at 822, n. 17; nor do we.

Cousins v. *Wigoda*, 419 U. S. 477 (1975) (State cannot dictate who may sit as state delegates to Democratic National Convention); cf. *Tashjian*, *supra*, at 235–236 (SCALIA, J., dissenting) ("The ability of the members of [a political p]arty to select their own candidate . . . unquestionably implicates an associational freedom").

The laws at issue burden these rights. By requiring parties to establish official governing bodies at the county level, California prevents the political parties from governing themselves with the structure they think best.[20] And by specifying who shall be the members of the parties' official governing bodies, California interferes with the parties' choice of leaders. A party might decide, for example, that it will be more effective if a greater number of its official leaders are local activists rather than Washington-based elected officials. The Code prevents such a change. A party might also decide that the state central committee chair needs more than two years to successfully formulate and implement policy. The Code prevents such an extension of the chair's term of office. A party might find that a resident of northern California would be particularly effective in promoting the party's message and in unifying the party. The Code prevents her from chairing the state central committee unless the preceding chair was from the southern part of the State.

Each restriction thus limits a political party's discretion in how to organize itself, conduct its affairs, and select its leaders. Indeed, the associational rights at stake are much stronger than those we credited in *Tashjian*. There, we found that a party's right to free association embraces a right to allow registered voters who are not party members to vote in the party's primary. Here, party members do not seek to

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[20] For example, the Libertarian Party was forced to abandon its region-based organization in favor of the statutorily mandated county-based system.

associate with nonparty members, but only with one another in freely choosing their party leaders.[21]

Because the challenged laws burden the associational rights of political parties and their members, the question is whether they serve a compelling state interest. A State indisputably has a compelling interest in preserving the integrity of its election process. *Rosario* v. *Rockefeller*, 410 U. S. 752, 761 (1973). Toward that end, a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. *Storer* v. *Brown*, 415 U. S., at 730. For example, a State may impose certain eligibility requirements for voters in the general election even though they limit parties' ability to garner support and members. See, *e. g.*, *Dunn* v. *Blumstein*, 405 U. S., at 343–344 (residence requirement); *Oregon* v. *Mitchell*, 400 U. S. 112, 118 (1970) (age minimum); *Kramer* v. *Union Free School Dist. No. 15*, 395 U. S. 621, 625 (1969) (citizenship requirement). We have also recognized that a State may impose restrictions that promote the integrity of primary elections. See, *e. g.*, *American Party of Texas* v. *White*, 415 U. S., at 779–780 (requirement that major political parties nominate candidates through a primary and that minor parties nominate candidates through conventions); *id.*, at 785–786 (limitation on voters' participation to one primary and bar on voters both voting in a party primary and signing a petition supporting an independent candidate); *Rosario* v. *Rockefeller*, *supra* (waiting periods before voters may change party registration and participate in another party's primary); *Bullock* v. *Carter*, 405 U. S., at 145 (reasonable filing fees as a condition of placement on the ballot). None of these restrictions, however, involved direct regulation of

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[21] By regulating the identity of the parties' leaders, the challenged statutes may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message.

a party's leaders.[22] Rather, the infringement on the associational rights of the parties and their members was the indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections.

In the instant case, the State has not shown that its regulation of internal party governance is necessary to the integrity of the electoral process. Instead, it contends that the challenged laws serve a compelling "interest in the 'democratic management of the political party's internal affairs.'" Brief for Appellants 43 (quoting 415 U. S., at 781, n. 15). This, however, is not a case where intervention is necessary to prevent the derogation of the civil rights of party adherents. Cf. *Smith* v. *Allwright*, 321 U. S. 649 (1944). Moreover, as we have observed, the State has no interest in "protect[ing] the integrity of the Party against the Party itself." *Tashjian*, 479 U. S., at 224. The State further claims that limiting the term of the state central committee chair and requiring that the chair rotate between residents of northern and southern California helps "prevent regional friction from reaching a 'critical mass.'" Brief for Appellants 48. How-

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[22] *Marchioro* v. *Chaney*, 442 U. S. 191 (1979), is not to the contrary. There we upheld a Washington statute mandating that political parties create a state central committee, to which the Democratic Party, not the State, had assigned significant responsibilities in administering the party, raising and distributing funds to candidates, conducting campaigns, and setting party policy. *Id.*, at 198–199. The statute only required that the state central committee perform certain limited functions such as filling vacancies on the party ticket, nominating Presidential electors and delegates to national conventions, and calling state-wide conventions. The party members did not claim that these *statutory* requirements imposed impermissible burdens on the party or themselves, so we had no occasion to consider whether the challenged law burdened the party's First Amendment rights, and if so, whether the law served a compelling state interest. *Id.*, at 197, n. 12. Here, in contrast, it is state law, not a political party's charter, that places the state central committees at a party's helm and, in particular, assigns the statutorily mandated committee responsibility for conducting the party's campaigns.

ever, a State cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure, any more than it can tell a party that its proposed communication to party members is unwise. *Tashjian*, *supra*, at 224.

In sum, a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair. Because California has made no such showing here, the challenged laws cannot be upheld.[23]

III

For the reasons stated above, we hold that the challenged California election laws burden the First Amendment rights of political parties and their members without serving a compelling state interest. Accordingly, the judgment of the Court of Appeals is

Affirmed.

CHIEF JUSTICE REHNQUIST took no part in the consideration or decision of this case.

JUSTICE STEVENS, concurring.

Today the Court relies on its opinion in *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 183–185 (1979)—and, in particular, on a portion of that opinion that I did not join—for its formulation of the governing standards in election cases. In that case JUSTICE BLACKMUN explained his acceptance of the Court's approach in words that precisely express my views about this case. He wrote:

> "Although I join the Court's opinion . . . , I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what

[23] Because we find that curbing intraparty friction is not a compelling state interest as long as the electoral process remains fair and orderly, we need not address the appellees' contention that the challenged laws weaken rather than strengthen parties.

seems to be a continuing tendency in this Court to use as tests such easy phrases as 'compelling [state] interest' and 'least drastic [or restrictive] means.' See, *ante*, at 184, 185, and 186. I have never been able fully to appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling,' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, 'least drastic means' is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification.

"I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and I must endeavor to disassociate myself from them. Apart from their use, however, the result the Court reaches here is the correct one. It is with these reservations that I join the Court's opinion." *Id.*, at 188–189.

With those same reservations I join the Court's opinion today.

UNITED STATES *v.* RON PAIR ENTERPRISES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87–1043. Argued October 31, 1988—Decided February 22, 1989

After respondent filed a petition under Chapter 11 of the Bankruptcy Code of 1978 (Code), the Government filed proof of a prepetition claim for unpaid withholding and social security taxes, penalties, and prepetition interest. The claim was perfected through a tax lien on property owned by respondent. Respondent's ensuing reorganization plan provided for full payment of the claim but did not provide for postpetition interest. The Government objected, contending that § 506(b) of the Code—which allows the holder of an oversecured claim to recover, in addition to the prepetition amount of the claim, "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose"—allowed recovery of postpetition interest, since the property securing its claim had a value greater than the amount of the principal debt. The Bankruptcy Court overruled this objection, but the District Court reversed. The Court of Appeals reversed the District Court, holding that § 506(b) codified the pre-Code standard that allowed postpetition interest on an oversecured claim only where the lien on the claim was consensual in nature.

Held: Section 506(b) entitles a creditor to receive postpetition interest on a nonconsensual oversecured claim allowed in a bankruptcy proceeding. Pp. 238–249.

(a) The natural reading of the phrase in § 506(b) that "there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose" entitles the holder of an oversecured claim to postpetition interest and, in addition, the holder of a secured claim pursuant to an agreement the right to the specified fees, costs, and charges. Recovery of postpetition interest is unqualified, whereas recovery of those fees, costs, and charges is allowed only if they are reasonable and provided for in the agreement under which the claim arose. Therefore, in the absence of an agreement, postpetition interest is the only added recovery available. This reading of § 506(b) is also mandated by its grammatical structure. Since the phrase "interest on such claim" is set aside by commas, and separated from the reference to fees, costs, and charges by the conjunctive words "and any," that phrase stands independent of the language that follows. Pp. 241–242.

(b) Allowing postpetition interest on nonconsensual oversecured liens does not contravene the intent of the Code's framers, nor does it conflict with any other section of the Code or any important state or federal interest. The legislative history does not suggest a contrary view. Pp. 242–243.

(c) There is no significant reason why Congress would have intended, or any policy reason would compel, that consensual and nonconsensual liens be treated differently in allowing postpetition interest. Section 506(b)'s language clearly directs that postpetition interest be paid on all oversecured claims. *Midlantic National Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, and *Kelly* v. *Robinson*, 479 U. S. 36, distinguished. Pp. 243–246.

(d) The pre-Code practice of denying postpetition interest to holders of nonconsensual liens, while allowing it to holders of consensual liens, was an exception to the exception for oversecured claims from the rule that the running of interest ceased when a bankruptcy petition was filed, and was recognized by only a few courts and often depended on particular circumstances. The fact that this Court has never clearly acknowledged or relied upon the refusal of some Courts of Appeals to apply the oversecured claim exception to an oversecured federal tax claim counsels against concluding that such limitation was well recognized. Also arguing against considering this limitation a clear rule are the facts that all cases that limited the exception were tax-lien cases, that the "rule" has never been extended to other forms of nonconsensual liens, and that in the few cases where it was recognized, it was only a guide to the bankruptcy trustee's exercise of his powers in the particular circumstances of the case. Pp. 246–249.

828 F. 2d 367, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 249.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Rose*, *Alan I. Horowitz*, *Wynette J. Hewett*, and *Martha B. Brissette*.

I. William Cohen argued the cause for respondent. With him on the brief was *Michael H. Traison*.*

**George Kaufmann*, *Peter W. Morgan*, and *Lawrence D. Garr* filed a brief for United Refining Co. as *amicus curiae* urging affirmance.

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we must decide the narrow statutory issue whether § 506(b) of the Bankruptcy Code of 1978, 11 U. S. C. § 506(b) (1982 ed., Supp. IV), entitles a creditor to receive postpetition interest on a nonconsensual oversecured claim allowed in a bankruptcy proceeding. We conclude that it does, and we therefore reverse the judgment of the Court of Appeals.

I

Respondent Ron Pair Enterprises, Inc., filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on May 1, 1984, in the United States Bankruptcy Court for the Eastern District of Michigan. The Government filed timely proof of a prepetition claim of $52,277.93, comprised of assessments for unpaid withholding and Social Security taxes, penalties, and prepetition interest. The claim was perfected through a tax lien on property owned by respondent. Respondent's First Amended Plan of Reorganization, filed October 1, 1985, provided for full payment of the prepetition claim, but did not provide for postpetition interest on that claim. The Government filed a timely objection, claiming that § 506(b) allowed recovery of postpetition interest, since the property securing the claim had a value greater than the amount of the principal debt. At the Bankruptcy Court hearing, the parties stipulated that the claim was oversecured, but the court subsequently overruled the Government's objection. The Government appealed to the United States District Court for the Eastern District of Michigan. That court reversed the Bankruptcy Court's judgment, concluding that the plain language of § 506(b) entitled the Government to postpetition interest.

The United States Court of Appeals for the Sixth Circuit, in its turn, reversed the District Court. 828 F. 2d 367 (1987). While not directly ruling that the language of § 506(b) was ambiguous, the court reasoned that reference to pre-Code law was appropriate "in order to better understand

the context in which the provision was drafted and therefore the language itself." *Id.*, at 370. The court went on to note that under pre-Code law the general rule was that post-petition interest on an oversecured prepetition claim was allowable only where the lien was consensual in nature. In light of this practice, and of the lack of any legislative history evincing an intent to change the standard, the court held that § 506(b) codified the pre-existing standard, and that post-petition interest was allowable only on consensual claims. Because this result was in direct conflict with the view of the Court of Appeals for the Fourth Circuit, see *Best Repair Co.* v. *United States*, 789 F. 2d 1080 (1986), and with the views of other courts,[1] we granted certiorari, 485 U. S. 958 (1988), to resolve the conflict.

II

Section 506,[2] enacted as part of the extensive 1978 revision of the bankruptcy laws, governs the definition and treatment

[1] Most bankruptcy courts interpreting § 506(b) have permitted the holder of an oversecured claim to recover postpetition interest. These courts have considered both state and federal tax liens, see, *e. g.*, *In re Brandenburg*, 71 B. R. 719 (SD 1987); *In re Busone*, 71 B. R. 201 (EDNY 1987); *In re Gilliland*, 67 B. R. 410 (ND Tex. 1986); *In re Hoffman*, 28 B. R. 503 (Md. 1983), and private nonconsensual liens, such as judicial and mechanic's liens, see, *e. g.*, *In re Charter Co.*, 63 B. R. 568 (MD Fla. 1986); *In re Romano*, 51 B. R. 813 (MD Fla. 1985); *In re Morrissey*, 37 B. R. 571 (ED Va. 1984). One other Court of Appeals and a leading commentator have taken the position that § 506(b) codifies pre-Code law and distinguishes between consensual and nonconsensual liens in determining the allowance of postpetition interest. See *In re Newbury Cafe, Inc.*, 841 F. 2d 20 (CA1 1988), cert. pending, No. 87-1784; 3 Collier on Bankruptcy ¶ 506.05, p. 506-41, and n. 5b (15th ed. 1988).

[2] Section 506, as amended, reads:

"(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so sub-

of secured claims, *i. e.*, claims by creditors against the estate that are secured by a lien on property in which the estate has an interest. Subsection (a) of § 506 provides that a claim is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured.[3] Subsection (b) is concerned specifically with oversecured claims, that is, any claim that is for an amount less than the value of the property securing it. Thus, if a $50,000 claim were secured by a lien on property having a value of $75,000, the claim would be oversecured, provided the trustee's costs of preserving or disposing of the property were less than $25,000. Section 506(b) allows a

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ject to setoff is less than the amount of such allowed claim. Such value should be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

"(b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.

"(c) The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

"(d) To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—

"(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or

"(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title." 11 U. S. C. § 506 (1982 ed. and Supp. IV).

[3] Thus, a $100,000 claim, secured by a lien on property of a value of $60,000, is considered to be a secured claim to the extent of $60,000, and to be an unsecured claim for $40,000. See 3 Collier on Bankruptcy ¶ 506.04, p. 506–15 (15th ed. 1988) ("[S]ection 506(a) requires a bifurcation of a 'partially secured' or 'undersecured' claim into separate and independent secured claim and unsecured claim components").

holder of an oversecured claim to recover, in addition to the prepetition amount of the claim, "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose."

The question before us today arises because there are two types of secured claims: (1) voluntary (or consensual) secured claims, each created by agreement between the debtor and the creditor and called a "security interest" by the Code, 11 U. S. C. § 101(45) (1982 ed., Supp. IV), and (2) involuntary secured claims, such as a judicial or statutory lien, see 11 U. S. C. §§ 101(32) and (47) (1982 ed., Supp. IV), which are fixed by operation of law and do not require the consent of the debtor. The claim against respondent's estate was of this latter kind. Prior to the passage of the 1978 Code, some Courts of Appeals drew a distinction between the two types for purposes of determining postpetition interest. The question we must answer is whether the 1978 Code recognizes and enforces this distinction, or whether Congress intended that all oversecured claims be treated the same way for purposes of postpetition interest.

III

Initially, it is worth recalling that Congress worked on the formulation of the Code for nearly a decade. It was intended to modernize the bankruptcy laws, see H. R. Rep. No. 95–595, p. 3 (1977) (Report), and as a result made significant changes in both the substantive and procedural laws of bankruptcy. See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 52–53 (1982) (plurality opinion). In particular, Congress intended "significant changes from current law in . . . the treatment of secured creditors and secured claims." Report, at 180. In such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no

need for a court to inquire beyond the plain language of the statute.

A

The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself. *Landreth Timber Co.* v. *Landreth*, 471 U. S. 681, 685 (1985). In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti* v. *United States*, 242 U. S. 470, 485 (1917). The language before us expresses Congress' intent—that postpetition interest be available—with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary.

The relevant phrase in § 506(b) is: "[T]here shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." "Such claim" refers to an oversecured claim. The natural reading of the phrase entitles the holder of an oversecured claim to postpetition interest and, in addition, gives one having a secured claim created pursuant to an agreement the right to reasonable fees, costs, and charges provided for in that agreement. Recovery of postpetition interest is unqualified. Recovery of fees, costs, and charges, however, is allowed only if they are reasonable and provided for in the agreement under which the claim arose. Therefore, in the absence of an agreement, postpetition interest is the only added recovery available.

This reading is also mandated by the grammatical structure of the statute. The phrase "interest on such claim" is set aside by commas, and separated from the reference to fees, costs, and charges by the conjunctive words "and any." As a result, the phrase "interest on such claim" stands independent of the language that follows. "[I]nterest on such claim" is not part of the list made up of "fees, costs, or

charges," nor is it joined to the following clause so that the final "provided for under the agreement" modifies it as well. See *Best Repair Co.* v. *United States*, 789 F. 2d, at 1082. The language and punctuation Congress used cannot be read in any other way.[4] By the plain language of the statute, the two types of recovery are distinct.[5]

B

The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S. 564, 571 (1982). In such cases, the intention of the drafters, rather than the strict language, controls. *Ibid.* It is clear that allowing postpetition interest on

[4] The United States Court of Appeals for the Fourth Circuit pointed out in *Best Repair Co.* that, had Congress intended to limit postpetition interest to consensual liens, § 506(b) could have said: "there shall be allowed to the holder of such claim, as provided for under the agreement under which such claim arose, interest on such claim and any reasonable fees, costs or charges." 789 F. 2d, at 1082, n. 2. A less clear way of stating this, closer to the actual language, would be: "there shall be allowed to the holder of such claim, interest on such claim and reasonable fees, costs, and charges provided for under the agreement under which such claim arose." *Ibid.*

[5] It seems to us that the interpretation adopted by the Court of Appeals in this case not only requires that the statutory language be read in an unnatural way, but that it is inconsistent with the remainder of § 506 and with terminology used throughout the Code. Adopting the Court of Appeals' view would mean that § 506(b) is operative only in regard to consensual liens, *i. e.*, that only a holder of an oversecured claim arising from an agreement is entitled to any added recovery. But the other portions of § 506 make no distinction between consensual and nonconsensual liens. Moreover, had Congress intended § 506(b) to apply only to consensual liens, it would have clarified its intent by using the specific phrase, "security interest," which the Code employs to refer to liens created by agreement. 11 U. S. C. § 101(45) (1982 ed., Supp. IV). When Congress wanted to restrict the application of a particular provision of the Code to such liens, it used the term "security interest." See, *e. g.*, 11 U. S. C. §§ 362(b)(12) and (13), 363(a), 547(c)(3)–(5), 552, 752(c), 1110(a), 1168(a), 1322(b)(2) (1982 ed. and Supp. IV).

nonconsensual oversecured liens does not contravene the intent of the framers of the Code. Allowing such interest does not conflict with any other section of the Code, or with any important state or federal interest; nor is a contrary view suggested by the legislative history.[6] Respondent has not articulated, nor can we discern, any significant reason why Congress would have intended, or any policy reason would compel, that the two types of secured claims be treated differently in allowing postpetition interest.

C

Respondent urges that pre-Code practice drew a distinction between consensual and nonconsensual liens for the purpose of determining entitlement to postpetition interest, and that Congress' failure to repudiate that distinction requires us to enforce it. It is respondent's view, as it was the view of the Court of Appeals, that *Midlantic National Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494 (1986), and *Kelly* v. *Robinson*, 479 U. S. 36 (1986), so require. We disagree.

In *Midlantic* we held that § 554(a) of the Code, 11 U. S. C. § 554(a), which provides that "the trustee may abandon any property of the estate that is burdensome to the estate," does not give a trustee the authority to violate state health and safety laws by abandoning property containing hazardous wastes. 474 U. S., at 507. In reaching that conclusion, we noted that according to pre-Code doctrine the trustee's au-

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[6] See H. R. 6, 95th Cong., 1st Sess. (1977); H. R. 8200, 95th Cong., 1st Sess. (1977); S. 2266, 95th Cong., 1st Sess. (1977). Because the final version of the statute contained the same language as that initially introduced, there was no change during the legislative process that could shed light on the meaning of the allowance of interest. See generally 3 Collier on Bankruptcy ¶ 506.03, pp. 506–7 to 506–12. Neither the Committee Reports nor the statements by the managers of the legislation discuss the question of postpetition interest at all. See Report, at 356; S. Rep. No. 95–989, p. 68 (1978); 124 Cong. Rec. 32398 (1978) (statement of Rep. Edwards); *id.*, at 33997 (statement of Sen. DeConcini).

thority to dispose of property could be limited in order "to protect legitimate state or federal interests." *Id.*, at 500. But we did not rest solely, or even primarily, on a presumption of continuity with pre-Code practice. Rather, we concluded that a contrary result would render abandonment doctrine inconsistent with other provisions of the Code itself, which embody the principle that "the trustee is not to have *carte blanche* to ignore nonbankruptcy law." *Id.*, at 502. We also recognized that the outcome sought would be not only a departure from pre-Code practice, but also "an extraordinary exemption from nonbankruptcy law," *id.*, at 501, requiring some clearer expression of congressional intent. We relied as well on Congress' repeated emphasis in environmental legislation "on its 'goal of protecting the environment against toxic pollution.'" *Id.*, at 505, quoting *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 143 (1985). To put it simply, we looked to pre-Code practice for interpretive assistance, because it appeared that a literal application of the statute would be "demonstrably at odds with the intentions of its drafters." *Griffin* v. *Oceanic Contractors, Inc.*, 458 U. S., at 571.

A similar issue presented itself in *Kelly* v. *Robinson*, *supra*, where we held that a restitution obligation, imposed as part of a state criminal sentence, was not dischargeable in bankruptcy. We reached this conclusion by interpreting § 523(a)(7) of the Code,[7] 11 U. S. C. § 523(a)(7), as "preserv[ing] from discharge any condition a state criminal court imposes as part of a criminal sentence." 479 U. S., at 50. We noted that the Code provision was "subject to interpretation," *ibid.*, and considered both legislative history and pre-Code practice in aid of that interpretation. But in determin-

[7] Section 523(a)(7) provides that a discharge in bankruptcy does not affect any debt that "is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . . ."

ing that Congress had not intended to depart from pre-Code practice in this regard, we did not rely on a pale presumption to that effect. We concluded that the pre-Code practice had been animated by "a deep conviction that federal bankruptcy courts should not invalidate the results of state criminal proceedings," *id.*, at 47, which has its source in the basic principle of our federalism that "the States' interest in administering their criminal justice systems free from federal interference is one of the most powerful of the considerations that should influence a court considering equitable types of relief." *Id.*, at 49. In *Kelly*, as in *Midlantic*, pre-Code practice was significant because it reflected policy considerations of great longevity and importance.[8]

Kelly and *Midlantic* make clear that, in an appropriate case, a court must determine whether Congress has expressed an intent to change the interpretation of a judicially created concept in enacting the Code. But *Midlantic* and *Kelly* suggest that there are limits to what may constitute an appropriate case. Both decisions concerned statutory language which, at least to some degree, was open to interpretation. Each involved a situation where bankruptcy law, under the proposed interpretation, was in clear conflict with state or federal laws of great importance. In the present case, in contrast, the language in question is clearer than the language at issue in *Midlantic* and *Kelly:* as written it directs that postpetition interest be paid on all oversecured claims. In addition, this natural interpretation of the statutory language does not conflict with any significant state or federal interest, nor with any other aspect of the Code. Although the payment of postpetition interest is arguably somewhat in tension with the desirability of paying all creditors as uni-

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[8] The rule preventing discharge of criminal fines was articulated promptly after the Bankruptcy Act of 1898 was passed, see *In re Moore*, 111 F. 145, 148–149 (WD Ky. 1901), and was uniformly accepted at the time Congress was considering the Code. See *Kelly* v. *Robinson*, 479 U. S., at 45–46.

formly as practicable, Congress expressly chose to create that alleged tension. There is no reason to suspect that Congress did not mean what the language of the statute says.

D

But even if we saw the need to turn to pre-Code practice in this case, it would be of little assistance. The practice of denying postpetition interest to the holders of nonconsensual liens, while allowing it to holders of consensual liens, was an exception to an exception, recognized by only a few courts and often dependent on particular circumstances. It was certainly not the type of "rule" that we assume Congress was aware of when enacting the Code; nor was it of such significance that Congress would have taken steps other than enacting statutory language to the contrary.

There was, indeed, a pre-Code rule that the running of interest ceased when a bankruptcy petition was filed. See *Sexton* v. *Dreyfus*, 219 U. S. 339, 344 (1911). Two exceptions to this rule had been recognized under pre-Code practice. The first allowed postpetition interest when the debtor ultimately proved to be solvent; the second allowed dividends and interest earned by securities held by the creditor as collateral to be applied to postpetition interest. See *City of New York* v. *Saper*, 336 U. S. 328, 330, n. 7 (1949). Neither of these exceptions would be relevant to this case. A third exception was of more doubtful provenance: an exception for oversecured claims. At least one Court of Appeals refused to apply this exception, *United States* v. *Harrington*, 269 F. 2d 719, 722 (CA4 1959), and there was some uncertainty among courts which did recognize it as to whether this Court ever had done so. *United States* v. *Bass*, 271 F. 2d 129, 131, n. 3 (CA9 1959); but see *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 159 (1946).

What is at issue in this case is not the oversecured claim exception *per se*, but an exception to that exception. Several Courts of Appeals refused to apply the oversecured

claim exception to an oversecured federal tax claim. See *United States* v. *Harrington*, 269 F. 2d, at 722–723 (holding that even if there were a general exception for oversecured claims, it would not apply to tax liens); *United States* v. *Bass*, 271 F. 2d, at 132; *In re Kerber Packing Co.*, 276 F. 2d 245, 247–248 (CA7 1960); see also *In re Boston & Maine Corp.*, 719 F. 2d 493, 496 (CA1 1983) (municipal property tax claim), cert. denied *sub nom. City of Cambridge* v. *Meserve*, 466 U. S. 938 (1984). But see *In re Parchem*, 166 F. Supp. 724, 730 (Minn.) (allowing postpetition interest on tax claim), appeal dism'd upon stipulation, 261 F. 2d 839 (CA8 1958); *In re Ross Nursing Home*, 2 B. R. 496, 499–500 (Bkrtcy., EDNY 1980) (same). It is this refusal to apply the exception that the Court of Appeals thought constituted a well-established judicially created rule.

The fact that this Court never clearly has acknowledged or relied upon this limitation on the oversecured-claim exception counsels against concluding that the limitation was well recognized. Also arguing against considering this limitation a clear rule is the fact that all the cases that limited the third exception were tax-lien cases. Each gave weight to *City of New York* v. *Saper*, *supra*, where this Court had ruled that postpetition interest was not available on *unsecured* tax claims, and reasoned that the broad language of that case denied it for all tax claims. See *United States* v. *Harrington*, 269 F. 2d, at 721–722; *United States* v. *Bass*, 271 F. 2d, at 132; *In re Kerber Packing Co.*, 276 F. 2d, at 247.[9] The rule

[9] Some pre-Code courts also distinguished between the two types of liens because nonconsensual liens were often fixed to the entirety of a debtor's property, while consensual liens usually were fixed to a particular item of property. Whatever the merit of the distinction, modern commercial lending practices have changed, and it is not unusual for commercial lenders to obtain a lien on almost all of the debtor's property. Congress, in enacting the Code, was aware of this, see Report, at 127, and in fact took specific steps to deal with such blanket liens on household goods, see 11 U. S. C. § 522(f)(2). On the other hand, not all nonconsensual liens attach broadly to a debtor's property. A typical mechanic's or construction

articulated in these cases never was extended to other forms of nonconsensual liens. Obviously, there is no way to read § 506(b) as allowing postpetition interest on all oversecured claims except claims based on unpaid taxes. For this reason, the statute Congress wrote is simply not subject to a reading that would harmonize it with the supposed pre-Code rule.

More importantly, this "rule," in the few cases where it was recognized, was only a guide to the trustee's exercise of his powers in the particular circumstances of the case. We have noted that "the touchstone of each decision on allowance of interest in bankruptcy . . . has been a balance of equities between creditor and creditor or between creditors and the debtor." *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S., at 165. All the exceptions to the denial of postpetition interest "are not rigid doctrinal categories. Rather, they are flexible guidelines which have been developed by the courts in the exercise of their equitable powers in insolvency proceedings." *In re Boston & Maine Corp.*, 719 F. 2d, at 496. None of the cases cited by the Court of Appeals states that the doctrine does anything more than provide a bankruptcy court with guidance in the exercise of its equitable powers. As such, there is no reason to think that Congress, in enacting a contrary standard, would have felt the need expressly to repudiate it. The contrary view, which is the view we adopt today, is more consistent with Congress' stated intent, in enacting the Code, to "codif[y] creditors' rights *more clearly than the case law* . . . [by] defin[ing] the protections to which a secured creditor is entitled, and the means through which the court may grant that protection." Report, at 4–5 (emphasis added). Whether or

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lien is limited to the property on which the improvement is made. See T. Crandall, R. Hagedorn, & F. Smith, Debtor-Creditor Law Manual ¶ 9.02[2] (1985).

not Congress took notice of the pre-Code standard, it acted with sufficient clarity in enacting the statute.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

The Court's decision is based on two distinct lines of argument. First, the Court concludes that the language of § 506(b) of the Bankruptcy Code, 11 U. S. C. § 506(b), is clear and unambiguous. Second, the Court takes a very narrow view of *Midlantic National Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494 (1986), and its progeny. I disagree with both aspects of the Court's opinion, and with the conclusion to which they lead.

The relevant portion of § 506(b) provides that "there shall be allowed to the holder of [an oversecured] claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." The Court concludes that the only natural reading of § 506(b) is that recovery of postpetition interest is "unqualified." *Ante*, at 241. As Justice Frankfurter remarked some time ago, however: "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification." *United States* v. *Monia*, 317 U. S. 424, 431 (1943) (dissenting opinion).

Although "the use of the comma is exceedingly arbitrary and indefinite," *United States* v. *Palmer*, 3 Wheat. 610, 638 (1818) (separate opinion of Johnson, J.), the Court is able to read § 506(b) the way that it does only because of the comma following the phrase "interest on such claim." Without this "capricious" bit of punctuation, *In re Newbury Cafe, Inc.*, 841 F. 2d 20, 22 (CA1 1988), cert. pending, No. 87–1784, the relevant portion of § 506(b) would read as follows: "there shall be allowed to the holder of [an oversecured] claim, interest on such claim and any reasonable fees, costs, or charges pro-

vided for under the agreement under which such claim arose." The phrase "interest on such claim" would be qualified by the phrase "provided for under the agreement under which such claim arose," and nonconsensual liens would not accrue postpetition interest. See *Porto Rico Railway, Light & Power Co.* v. *Mor*, 253 U. S. 345, 348 (1920) ("When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all"). This conclusion is not altered by the fact that the words "and any" follow the phrase "interest on such claim." Those words simply indicate that interest accrues only on the amount of the claim, and not on "fees, costs, or charges" that happen to be incurred by the creditor.

The Court's reliance on the comma is misplaced. "[P]unctuation is not decisive of the construction of a statute." *Costanzo* v. *Tillinghast*, 287 U. S. 341, 344 (1932). See also *Barrett* v. *Van Pelt*, 268 U. S. 85, 91 (1925) ("'Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning'"); *Ewing* v. *Burnet*, 11 Pet. 41, 53–54 (1837) ("Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning: if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it"). Under this rule of construction, the Court has not hesitated in the past to change or ignore the punctuation in legislation in order to effectuate congressional intent. See, *e. g.*, *Simpson* v. *United States*, 435 U. S. 6, 11–12, n. 6 (1978) (ignoring punctuation and conjunction so that qualifying phrase would modify antecedent followed by comma and the word "or"); *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 479–480 (1899) (ignoring

punctuation so that qualifying phrase would restrict antecedent set off by commas and followed by the word "and").

Although punctuation is not controlling, it can provide useful confirmation of conclusions drawn from the words of a statute. *United States* v. *Naftalin*, 441 U. S. 768, 774, n. 5 (1979). The Court attempts to buttress its interpretation of § 506(b) by suggesting that any other reading would be inconsistent with the remaining portions of § 506, which "make no distinction between consensual and nonconsensual liens." *Ante*, at 242, n. 5. But § 506(b), regardless of how it is read, does distinguish between types of liens. The phrase "provided for under the agreement under which such claim arose" certainly refers to consensual liens, and must qualify some preceding language. Even under the Court's interpretation, "reasonable fees, costs, or charges" can only be awarded if provided for in a consensual lien. Thus, limiting postpetition interest to consensual liens simply reinforces a distinction that already exists in § 506(b). For the same reason, I find unavailing the Court's assertion, *ibid.*, that Congress would have used the phrase "security interest" if it wanted to limit postpetition interest to consensual liens.

Even if I believed that the language of § 506(b) were clearer than it is, I would disagree with the Court's conclusion, for *Midlantic* counsels against inferring congressional intent to change pre-Code bankruptcy law. At issue in *Midlantic* was § 554(a) of the Code, 11 U. S. C. § 554(a), which provided that "[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate." Despite this unequivocal language, the Court held that § 554(a) does not authorize a trustee to abandon hazardous property in contravention of a state statute or regulation reasonably designed to protect the public health or safety. Relying on only three pre-Code cases (one did not deal with state laws and in another the relevant language was arguably dicta), the Court concluded that under pre-Code bankruptcy law there

were restrictions on a trustee's power to abandon property. 474 U. S., at 500–501. The Court stated that the "normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific," and noted that it had "followed this rule with particular care in construing the scope of bankruptcy codifications." *Id.*, at 501 (citations omitted). Given the pre-Code law and Congress' goal of protecting the environment, the Court was "unwilling to assume that by enactment of § 554(a), Congress implicitly overturned longstanding restrictions on the common law abandonment power." *Id.*, at 506.

The Court characterizes *Midlantic* as involving "a situation where bankruptcy law, under the proposed interpretation, was in clear conflict with state or federal laws of great importance." *Ante*, at 245. Though I agree with that characterization, I think there is more to *Midlantic* than conflict with state or federal laws. Contrary to the Court's intimation, *Midlantic* did not "concer[n] statutory language which . . . was open to interpretation." *Ante*, at 245. The language of § 554(a) is "absolute in its terms," 474 U. S., at 509 (REHNQUIST, J., dissenting), and the Court in *Midlantic* did not attempt to argue otherwise. Nonetheless, the Court concluded that such clear language was insufficient to demonstrate specific congressional intent to change pre-Code law. The rule of *Midlantic* is that bankruptcy statutes will not be deemed to have changed pre-Code law unless there is some indication that Congress thought that it was effecting such a change. See *Kelly* v. *Robinson*, 479 U. S. 36, 50–51 (1986) ("Nowhere in the House and Senate Reports is there any indication that this language should be read so intrusively. . . . If Congress had intended, by § 523(a)(7) [of the Code] or by any other provision, to discharge state criminal sentences, 'we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and so

likely to arouse public outrage'") (quoting *TVA* v. *Hill*, 437 U. S. 153, 209 (1978) (Powell, J., dissenting)).

The first step under *Midlantic* is to ascertain whether there was an established pre-Code bankruptcy practice. See 474 U. S., at 500–501. That question is easily answered here. Prior to the 1978 enactment of the Code, this Court, as well as every Court of Appeals to address the question, had refused to allow postpetition interest on nonconsensual liens such as the tax lien involved in this case. See *City of New York* v. *Saper*, 336 U. S. 328, 329–341 (1949); *In re Kerber Packing Co.*, 276 F. 2d 245, 246–248 (CA7 1960); *United States* v. *Mighell*, 273 F. 2d 682, 684 (CA10 1959); *United States* v. *Bass*, 271 F. 2d 129, 130–132 (CA9 1959); *United States* v. *Harrington*, 269 F. 2d 719, 723 (CA4 1959). See also *In re Boston & Maine Corp.*, 719 F. 2d 493, 495–498 (CA1 1983) (post-Code case not allowing postpetition interest on municipal tax lien), cert. denied *sub nom. City of Cambridge* v. *Meserve*, 466 U. S. 938 (1984). In order to deflect this line of cases, the Court refers to the practice "of denying postpetition interest to the holders of nonconsensual liens, while allowing it to holders of consensual liens," as "an exception to an exception." *Ante*, at 246. Regardless of how it is labeled, cf. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 586 (1937) ("Catch words and labels . . . are subject to the dangers that lurk in metaphors and symbols, and must be watched with circumspection lest they put us off our guard"), the practice was more widespread and more well established than the practice in *Midlantic*, and was certainly one that Congress "[would have been] aware of when enacting the Code." *Ante*, at 246.

The denial of postpetition interest on nonconsensual liens was based on the distinction between types of liens as well as equitable considerations. Unlike consensual liens, to which the parties voluntarily agree, nonconsensual liens depend for their existence only on legislative fiat. Thus, the justification for the allowance of postpetition interest on consensual

liens—"that when the creditor extended credit, he relied upon the particular security given as collateral to secure both the principal of the debt and interest until payment and, if the collateral is sufficient to pay him, the contract between the parties ought not be abrogated by bankruptcy," *United States* v. *Harrington*, 269 F. 2d, at 724—has no application to nonconsensual liens. The allowance of interest on nonconsensual liens is akin to a penalty on the debtor for the nonpayment of taxes or other monetary obligations imposed by law. Permitting postpetition interest on nonconsensual liens drains the pool of assets to the detriment of lower priority creditors who are not responsible for the debtor's inability to pay and who cannot avoid the imposition of postpetition interest. See *In re Boston & Maine Corp.*, 719 F. 2d, at 497. Indeed, the Court acknowledges that "the payment of postpetition interest is arguably somewhat in tension with the desirability of paying all creditors as uniformly as practicable." *Ante*, at 245–246.

The second step under *Midlantic* is to look for some indicia that Congress knew it was changing pre-Code law. See 474 U. S., at 502–505. As the Court said only last Term, "[I]t is most improbable that [a change in the existing bankruptcy rules] would have been made without even any mention in the legislative history." *United Savings Assn. of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 380 (1988). The legislative history of § 506(b) is "wholly inconclusive," *Best Repair Co.* v. *United States*, 789 F. 2d 1080, 1082 (CA4 1986), and there is no statement in that history acknowledging that § 506(b) was to work a major change in pre-Code law. Because there is no evidence whatsoever that § 506(b) was meant to allow postpetition interest on nonconsensual liens, it should not be assumed that Congress "silently abrogated" the pre-Code law. *Kelly* v. *Robinson*, 479 U. S., at 47.

For the reasons set forth above, I respectfully dissent.

HARRIS *v.* REED, WARDEN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 87–5677. Argued October 12, 1988—Decided February 22, 1989

Petitioner's state-court murder conviction was affirmed by the Appellate Court of Illinois on direct appeal, where petitioner challenged only the sufficiency of the evidence. The trial court then dismissed his petition for postconviction relief—which alleged ineffective assistance by his trial counsel in several respects, including the failure to call alibi witnesses—and the Appellate Court again affirmed. Although referring to the "well-settled" Illinois principle that issues that could have been, but were not, presented on direct appeal are considered waived, and finding that, "except for the alibi witnesses," petitioner's ineffective-assistance claim "could have been raised [on] direct appeal," the court nevertheless went on to consider and reject that claim on its merits. Petitioner then pursued the claim by filing a habeas corpus petition in the Federal District Court under 28 U. S. C. § 2254. While recognizing that, absent a showing of either "cause and prejudice" or a "miscarriage of justice," *Wainwright* v. *Sykes*, 433 U. S. 72, would have barred its consideration of the claim had the State Appellate Court held the claim waived under state law, the federal court determined that there had been no waiver holding, and went on to consider the claim in its entirety and to dismiss it on its merits. In affirming the dismissal, the Court of Appeals ruled that it was precluded from reviewing the claim's merits because it believed the claim to be procedurally barred. Finding the State Appellate Court's order to be "ambiguous" on the waiver question, the court nevertheless concluded that it was bound by the order's "suggest[ed]" intention "to find all grounds waived except that pertaining to the alibi witnesses."

Held:

1. The "'plain statement' rule" of *Michigan* v. *Long*, 463 U. S. 1032, 1042, and n. 7, is not limited to cases on direct review in this Court, but extends as well to cases on federal habeas review. Pp. 260–265.

(a) *Sykes'* procedural default rule is based on this Court's longstanding "adequate and independent state ground" doctrine, whereby the Court will not consider a federal law issue on direct review from a state-court judgment if that judgment rests on a state-law ground that is both "independent" of the federal claim's merits and an "adequate" basis for the court's decision. The *Long* rule avoids the difficulties that arise

under the doctrine when the state court's reference to state law is ambiguous, by permitting the Court to reach the federal question on direct review unless the state court's opinion contains "a plain statement" that its decision rests upon adequate and independent state grounds, whether substantive or procedural. Pp. 260–262.

(b) Since, as *Sykes* made clear, the adequate and independent state ground doctrine applies on federal habeas, and since federal courts on habeas review commonly face the same problem of ambiguity that was resolved by *Long*, the "plain statement" rule is adopted for habeas cases. Thus, a procedural default will not bar consideration of a federal claim on habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar. Pp. 262–263.

(c) Respondents' claim is not persuasive that the federal court in a habeas case should presume that the state-court judgment rests on a procedural bar whenever the state-court decision is ambiguous on that point. Applying the *Long* rule to habeas barely burdens the interests of finality, federalism, and comity, since the state court remains free under the rule to foreclose federal habeas review to the extent permitted by *Sykes* simply by explicitly relying on a state-law procedural default. Conversely, respondents' proposed rule would impose substantial burdens on the federal courts, which would lose much time in reviewing legal and factual issues that the state court, familiar with state law and the record before it, is better suited to address expeditiously. Pp. 263–265.

2. The State Appellate Court's statement that most of petitioner's ineffective-assistance-of-counsel allegations "could have been raised [on] direct appeal" does not satisfy the "plain statement" requirement, since it falls short of an explicit reliance on state-law waiver as a ground for rejecting any aspect of petitioner's claim. Accordingly, the statement does not preclude habeas review by the District Court. P. 266.

822 F. 2d 684, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, STEVENS, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 266. O'CONNOR, J., filed a concurring opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post*, p. 268. KENNEDY, J., filed a dissenting opinion, *post*, p. 271.

Kimball R. Anderson, by appointment of the Court, 485 U. S. 974, argued the cause for petitioner. With him on the briefs were *George B. Christensen* and *E. King Poor*.

Robert V. Shuff, Jr., First Assistant Attorney General of Illinois, argued the cause for respondents. With him on the brief were *Neil F. Hartigan*, Attorney General, *Robert J. Ruiz*, Solicitor General, and *Terence M. Madsen* and *Arleen C. Anderson*, Assistant Attorneys General.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case, we consider whether the "'plain statement' rule" of *Michigan* v. *Long*, 463 U. S. 1032, 1042, and n. 7 (1983), applies in a case on federal habeas review as well as in a case on direct review in this Court. We hold that it does.

I

Petitioner Warren Lee Harris was convicted in the Circuit Court of Cook County, Ill., of murder. On direct appeal, petitioner challenged only the sufficiency of the evidence. The Appellate Court of Illinois, by an unpublished order, affirmed the conviction. App. 5; see 71 Ill. App. 3d 1113, 392 N. E. 2d 1386 (1979).

Petitioner then returned to the Circuit Court of Cook County and filed a petition for postconviction relief, alleging that his trial counsel had rendered ineffective assistance in several respects, including his failure to call alibi witnesses.[1] The court dismissed the petition without an evidentiary hearing. The Appellate Court of Illinois, in another unpublished order, again affirmed. App. 9.

**Judith Lynn Libby* filed a brief for the National Legal Aid and Defender Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* were filed for the State of California *ex rel.* John K. Van de Kamp by *Mr. Van de Kamp*, Attorney General of California, *pro se*, *Steve White*, Chief Assistant Attorney General, and *Donald F. Roeschke*, Deputy Attorney General; and for the State of Florida by *Robert A. Butterworth*, Attorney General, and *Charles Corces, Jr.*, Assistant Attorney General.

[1] For a more extensive description of petitioner's ineffective-assistance-of-counsel claim, see the opinions of the District Court and the Court of Appeals in this case. 608 F. Supp. 1369 (ND Ill. 1985), and 822 F. 2d 684 (CA7 1987).

In its order, the Appellate Court referred to the "well-settled" principle of Illinois law that "those [issues] which could have been presented [on direct appeal], but were not, are considered waived." *Id.*, at 12. The court found that, "except for the alibi witnesses," petitioner's ineffective-assistance allegations "could have been raised in [his] direct appeal." *Ibid.* The court, however, went on to consider and reject petitioner's ineffective-assistance claim on its merits.

Petitioner did not seek review in the Supreme Court of Illinois. Instead, he pursued his ineffective-assistance-of-counsel claim in federal court by a petition for a writ of habeas corpus under 28 U. S. C. § 2254. The District Court recognized that if the Illinois Appellate Court had held this claim to be waived under Illinois law, this Court's decision in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), would bar a federal court's consideration of the claim unless petitioner was able to show either "cause and prejudice" or a "miscarriage of justice." 608 F. Supp. 1369, 1377 (ND Ill. 1985).[2]

The District Court, however, determined that the Illinois Appellate Court had not held any portion of the ineffective-assistance claim to have been waived. First, the District Court observed, the state court had "made clear" that the waiver did not apply to the issue of alibi witnesses. *Id.*, at 1378. Second, the court never clearly held any other issue waived. The state court "did not appear to make two rulings in the alternative, but rather to note a procedural default and then ignore it, reaching the merits instead." *Ibid.* Based on this determination, the District Court concluded that it was permitted to consider the ineffective-assistance claim in its entirety and ordered an evidentiary hearing. *Id.*, at 1385. After that hearing, the court, in an unpublished

[2] For discussion of the terms "cause and prejudice" and "miscarriage of justice," see *Murray* v. *Carrier*, 477 U. S. 478 (1986), and *Smith* v. *Murray*, 477 U. S. 527 (1986). This opinion need not, and thus does not, address the meanings of those terms.

memorandum and order, dismissed the claim on the merits, although it characterized the case as "a close and difficult" one. App. 45.

The Court of Appeals affirmed the dismissal, 822 F. 2d 684 (CA7 1987), but did not reach the merits because, in disagreement with the District Court, it believed the ineffective-assistance claim to be procedurally barred. Considering the Illinois Appellate Court's order "ambiguous" because it contained "neither an explicit finding of waiver nor an expression of an intention to ignore waiver," the Court of Appeals nonetheless asserted that a reviewing court "should try to assess the state court's intention to the extent that this is possible." *Id.*, at 687. Undertaking this effort, the Court of Appeals concluded that the order "suggest[ed]" an intention "to find all grounds waived except that pertaining to the alibi witnesses." *Ibid.* Based on this interpretation of the order, the Court of Appeals concluded that the merits of petitioner's federal claim had been reached only "as an alternate holding," *ibid.*, and considered itself precluded from reviewing the merits of the claim.[3]

Concurring separately, Judge Cudahy stated: "Rather than attempting to divine the unspoken 'intent' of [the state] court, I think we should invoke a presumption that waiver not clearly found has been condoned." *Ibid.*

The disagreement between the majority and the concurrence reflects a conflict among the Courts of Appeals over the standard for determining whether a state court's ambiguous invocation of a procedural default bars federal habeas re-

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[3] It is not clear why the Court of Appeals did not review at least the merits of petitioner's claim concerning the failure to present alibi witnesses, inasmuch as the court acknowledged that petitioner had not waived that aspect of his claim. Nor is it clear why, even with regard to the rest of petitioner's claim, the Court of Appeals did not consider the possibility of "cause and prejudice" or a "miscarriage of justice" under *Sykes* and its progeny. In view of our disposition of the case, we need not consider these omissions.

view.[4] We granted certiorari to resolve this conflict. 485 U. S. 934 (1988).

II

The confusion among the courts evidently stems from a failure to recognize that the procedural default rule of *Wainwright* v. *Sykes* has its historical and theoretical basis in the "adequate and independent state ground" doctrine. 433 U. S., at 78–79, 81–82, 87.[5] Once the lineage of the rule is clarified, the cure for the confusion becomes apparent.

A

This Court long has held that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision. See, *e. g.*, *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935); *Murdock* v. *City of Memphis*, 20 Wall. 590, 635–636 (1875). Although this doctrine originated in the context of state-court judgments

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[4] Compare, *e. g.*, *Hardin* v. *Black*, 845 F. 2d 953, 959 (CA11 1988) (federal court must address the merits of federal claim when it is unclear whether state court denied relief because of a procedural default or because of its view of the merits), with *Brasier* v. *Douglas*, 815 F. 2d 64, 65 (CA10 1987) (federal court must address the merits of federal claim whenever state court has addressed the merits of the federal claim, even if it is clear that the state court alternatively relied on a procedural bar), cert. denied, 483 U. S. 1023 (1987), and with *Shepard* v. *Foltz*, 771 F. 2d 962, 965 (CA6 1985) (when it is unclear whether the state court relied upon a procedural bar, the federal court should examine the arguments presented to the state court). See also *Mann* v. *Dugger*, 817 F. 2d 1471, 1487–1489 (CA11 1987) (Clark, J., specially concurring) (the *Michigan* v. *Long* "plain statement" rule applies on habeas as well as direct review), on rehearing en banc, 844 F. 2d 1446 (1988), cert. pending, No. 87-2073.

[5] Some judges, indeed, have analyzed the problem in terms of the adequate and independent state ground doctrine. See *Meadows* v. *Holland*, 831 F. 2d 493, 504 (CA4 1987) (Winter, C. J., dissenting from en banc decision), cert. pending, No. 87-6063; *Mann* v. *Dugger*, 817 F. 2d, at 1487–1489 (Clark, J., specially concurring).

for which the alternative state and federal grounds were both "substantive" in nature, the doctrine "has been applied routinely to state decisions forfeiting federal claims for violation of state procedural rules." Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1134 (1986).[6]

The question whether a state court's reference to state law constitutes an adequate and independent state ground for its judgment may be rendered difficult by ambiguity in the state court's opinion. In *Michigan* v. *Long*, 463 U. S. 1032 (1983), this Court laid down a rule to avoid the difficulties associated with such ambiguity. Under *Long*, if "it fairly appears that the state court rested its decision primarily on federal law," this Court may reach the federal question on review unless the state court's opinion contains a "'plain statement' that [its] decision rests upon adequate and independent state grounds." *Id.*, at 1042.[7]

The *Long* "plain statement" rule applies regardless of whether the disputed state-law ground is substantive (as it was in *Long*) or procedural, as in *Caldwell* v. *Mississippi*, 472 U. S. 320, 327 (1985). Thus, the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim: "[T]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the

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[6] See, *e. g.*, *Herndon* v. *Georgia*, 295 U. S. 441 (1935). For a discussion of whether a state procedural default ruling is "independent," see *Ake* v. *Oklahoma*, 470 U. S. 68, 74–75 (1985). On whether a state procedural default ruling is "adequate," see *Johnson* v. *Mississippi*, 486 U. S. 578, 587 (1988). See generally P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 590–627 (3d ed. 1988).

[7] Since *Long*, we repeatedly have followed this "plain statement" requirement. See, *e. g.*, *Michigan* v. *Chesternut*, 486 U. S. 567, 571, n. 3 (1988); *Kentucky* v. *Stincer*, 482 U. S. 730, 735, n. 7 (1987); *Maryland* v. *Garrison*, 480 U. S. 79, 83–84 (1987); *New York* v. *P. J. Video, Inc.*, 475 U. S. 868, 872, n. 4 (1986); *Delaware* v. *Van Arsdall*, 475 U. S. 673, 678, n. 3 (1986); *New York* v. *Class*, 475 U. S. 106, 109–110 (1986).

case." *Ibid.* Furthermore, ambiguities in that regard must be resolved by application of the *Long* standard. *Id.*, at 328.

B

The adequate and independent state ground doctrine, and the problem of ambiguity resolved by *Long*, is of concern not only in cases on direct review pursuant to 28 U. S. C. § 1257, but also in federal habeas corpus proceedings pursuant to 28 U. S. C. § 2254.

Wainwright v. *Sykes* made clear that the adequate and independent state ground doctrine applies on federal habeas. 433 U. S., at 81, 87. See also *Ulster County Court* v. *Allen*, 442 U. S. 140, 148 (1979). Under *Sykes* and its progeny, an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show "cause" for the default and "prejudice attributable thereto," *Murray* v. *Carrier*, 477 U. S. 478, 485 (1986), or demonstrate that failure to consider the federal claim will result in a "'fundamental miscarriage of justice.'" *Id.*, at 495, quoting *Engle* v. *Isaac*, 456 U. S. 107, 135 (1982). See also *Smith* v. *Murray*, 477 U. S. 527, 537 (1986).

Conversely, a federal claimant's procedural default precludes federal habeas review, like direct review, only if the last state court rendering a judgment in the case rests its judgment on the procedural default. See *Caldwell* v. *Mississippi*, 472 U. S., at 327; *Ulster County Court* v. *Allen*, 442 U. S., at 152–154. Moreover, the question whether the state court indeed has done so is sometimes as difficult to answer on habeas review as on direct review. Just as this Court under § 1257 encounters state-court opinions that are unclear on this point, so too do the federal courts under § 2254.[8]

Habeas review thus presents the same problem of ambiguity that this Court resolved in *Michigan* v. *Long*. We held in

[8] In this case, for example, both the District Court and the Court of Appeals found the Illinois Appellate Court's opinion ambiguous on this point.

Long that unless the state court clearly expressed its reliance on an adequate and independent state-law ground, this Court may address a federal issue considered by the state court. We applied that rule in *Caldwell* v. *Mississippi*, 472 U. S., at 327, to a "somewhat cryptic" reference to procedural default in a state-court opinion.

Although *Long* and *Caldwell* arose on direct review, the principles underlying those decisions are not limited to direct review. Indeed, our opinion in *Caldwell* relied heavily upon our earlier application of the adequate and independent state ground doctrine to habeas review in *Ulster County*. See *Caldwell*, 472 U. S., at 327–328. *Caldwell* thus indicates that the problem of ambiguous state-court references to state law, which led to the adoption of the *Long* "plain statement" rule, is common to both direct and habeas review. Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "'clearly and expressly'" states that its judgment rests on a state procedural bar. *Caldwell*, 472 U. S., at 327, quoting *Long*, 463 U. S., at 1041.[9]

C

Respondents, however, urge us to adopt a different rule for habeas cases, arguing that if a state-court decision is ambiguous as to whether the judgment rests on a procedural

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[9]This rule necessarily applies only when a state court has been presented with the federal claim, as will usually be true given the requirement that a federal claimant exhaust state-court remedies before raising the claim in a federal habeas petition. See 28 U. S. C. § 2254(b). Of course, a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred. *Castille* v. *Peoples*, *post*, at 351; *Teague* v. *Lane*, *post*, at 297–298 (plurality opinion). This case, however, does not involve an application of this exhaustion principle because petitioner did raise his ineffective-assistance claim in state court.

bar, the federal court should presume that it does. Respondents claim that applying the *Long* "plain statement" requirement to habeas cases would harm the interests of finality, federalism, and comity. This Court has been alert in recognizing that federal habeas review touches upon these significant state interests. *Wainwright* v. *Sykes* itself reveals this. See 433 U. S., at 90–91. We believe, however, that applying *Long* to habeas burdens those interests only minimally, if at all. The benefits, in contrast, are substantial.

A state court remains free under the *Long* rule to rely on a state procedural bar and thereby to foreclose federal habeas review to the extent permitted by *Sykes*.[10] Requiring a state court to be explicit in its reliance on a procedural default does not interfere unduly with state judicial decisionmaking. As *Long* itself recognized, it would be more intrusive for a federal court to second-guess a state court's determination of state law. 463 U. S., at 1041. Moreover, state courts have become familiar with the "plain statement" requirement under *Long* and *Caldwell*. Under our decision today, a state court need do nothing more to preclude habeas review than it must do to preclude direct review.

In contrast, respondents' proposed rule would impose substantial burdens on the federal courts. At oral argument, counsel for respondents conceded that in some circumstances, under their proposal, the federal habeas court would be forced to examine the state-court record to determine

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[10] Moreover, a state court need not fear reaching the merits of a federal claim in an *alternative* holding. By its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law. See *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935). Thus, by applying this doctrine to habeas cases, *Sykes* curtails reconsideration of the federal issue on federal habeas as long as the state court explicitly invokes a state procedural bar rule as a separate basis for decision. In this way, a state court may reach a federal question without sacrificing its interests in finality, federalism, and comity.

whether procedural default was argued to the state court, or would be required to undertake an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case. See Tr. of Oral Arg. 28–29. Much time would be lost in reviewing legal and factual issues that the state court, familiar with state law and the record before it, is better suited to address expeditiously. The "plain statement" requirement achieves the important objective of permitting the federal court rapidly to identify whether federal issues are properly presented before it. Respondents' proposed rule would not do that.[11]

Thus, we are not persuaded that we should depart from *Long* and *Caldwell* simply because this is a habeas case. Having extended the adequate and independent state ground doctrine to habeas cases, we now extend to habeas review the "plain statement" rule for determining whether a state court has relied on an adequate and independent state ground.[12]

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[11] Respondents argue that the "plain statement" requirement entails a presumption that state courts disobey their own procedural bar rules. This argument is inconsistent with *Caldwell*, which confirmed *Long*'s applicability to procedural default cases. In any event, respondents themselves recognize that in some instances state courts have discretion to forgive procedural defaults. See Brief for Respondents 10–11. The "plain statement" rule relieves a federal court from having to determine whether in a given case, consistent with state law, the state court has chosen to forgive a procedural default.

[12] Insofar as the dissent urges us to repudiate the application of *Long* in *Caldwell*, we decline to do so. Additionally, the dissent's fear, *post*, at 282, and n. 6, that our holding will submerge courts in a flood of improper prisoner petitions is unrealistic: a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that "relief is denied for reasons of procedural default." Of course, if the state court under state law chooses not to rely on a procedural bar in such circumstances, then there is no basis for a federal habeas court's refusing to consider the merits of the federal claim. See *Ulster County Court* v. *Allen*, 442 U. S. 140, 147–154 (1979).

III

Applying the "plain statement" requirement in this case, we conclude that the Illinois Appellate Court did not "clearly and expressly" rely on waiver as a ground for rejecting any aspect of petitioner's ineffective-assistance-of-counsel claim. *Michigan* v. *Long*, 463 U. S., at 1041. To be sure, the state court perhaps laid the foundation for such a holding by stating that most of petitioner's allegations "could have been raised [on] direct appeal." App. 12. Nonetheless, as the Court of Appeals recognized, this statement falls short of an explicit reliance on a state-law ground.[13] Accordingly, this reference to state law would not have precluded our addressing petitioner's claim had it arisen on direct review. As is now established, it also does not preclude habeas review by the District Court.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

In view of my dissent in *Michigan* v. *Long*, 463 U. S. 1032, 1065–1072 (1983), it is appropriate to add a few words explaining why there is unique virtue in applying the rule of that case to the problem presented by this case.

My dissent in *Michigan* v. *Long* was addressed primarily to two concerns. First, in adopting a presumption favoring the assertion of federal jurisdiction in ambiguous cases, the Court ignored the longstanding and venerated presumption

[13] While it perhaps could be argued that this statement would have sufficed had the state court never reached the federal claim, the state court clearly went on to reject the federal claim on the merits. As a result, the reference to state law in the state court's opinion is insufficient to demonstrate clearly whether the court intended to invoke waiver as an alternative ground. It is precisely with regard to such an ambiguous reference to state law in the context of clear reliance on federal law that *Long* permits federal review of the federal issue. See 463 U. S., at 1040–1041.

that federal courts are without jurisdiction unless "'the contrary appears affirmatively from the record.'" See *Delaware* v. *Van Arsdall*, 475 U. S. 673, 692 (1986) (STEVENS, J., dissenting) (quoting *King Bridge Co.* v. *Otoe County*, 120 U. S. 225, 226 (1887)). Second, in its original form, the presumption adopted in *Michigan* v. *Long* expanded this Court's review of cases in which state courts had overprotected their respective citizens. In my opinion, the federal courts—and particularly this Court—have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution. See 475 U. S., at 695–697. Although some cases involving overly expansive interpretations of federally protected rights surely merit federal review, the interest in correcting such errors is necessarily secondary to the federal courts' principal role as protector of federally secured rights. The expenditure of scarce judicial resources and the intrusion into state affairs is accordingly less justified when the state court has gone too far in protecting a federal right than when the state court has failed to provide the constitutional minimum of protection.

These concerns, however, are not implicated in a case such as this, in which a federal court, in considering a petition for a writ of habeas corpus, must decide whether a state procedural bar constitutes an adequate and independent state ground for denying relief. As our decisions in *Fay* v. *Noia*, 372 U. S. 391, 426–435 (1963), and *Wainwright* v. *Sykes*, 433 U. S. 72, 82–84 (1977), make clear, an adequate and independent state ground for decision does not dispossess the federal courts of jurisdiction on collateral review. More significantly, in considering petitions for relief under 28 U. S. C. § 2254, the federal courts do not review state-court decisions to determine if the States have gone too far in protecting the rights of their citizenry, but rather perform the core function of vindicating federally protected rights. Because the concerns that prevented me from joining the majority opinion in

Michigan v. *Long* are not present in this case, I join the Court's opinion and judgment.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE SCALIA join, concurring.

I join the Court's opinion and am in general agreement with its decision to apply the "plain statement" rule of *Michigan* v. *Long*, 463 U. S. 1032 (1983), to the state courts' invocation of state procedural default rules. I write separately to emphasize two points. First, I do not read the Court's opinion as addressing or altering the well-settled rule that the lower federal courts, and this Court, may properly inquire into the availability of state remedies in determining whether claims presented in a petition for federal habeas corpus have been properly exhausted in the state courts. See *Humphrey* v. *Cady*, 405 U. S. 504, 515–517 (1972); *Ex parte Hawk*, 321 U. S. 114, 118 (1944).

In 28 U. S. C. § 2254(b), Congress has provided that a writ of habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective processes or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." The exhaustion requirement is not satisfied if the habeas petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." § 2254(c). Thus, in determining whether a remedy for a particular constitutional claim is "available," the federal courts are authorized, indeed required, to assess the likelihood that a state court will accord the habeas petitioner a hearing on the merits of his claim.

The rule requiring that a habeas petitioner exhaust available remedies in state court before seeking review of the same claims via federal habeas corpus serves two important interests. First, its roots lie in the respect which the federal courts owe to the procedures erected by the States to correct constitutional errors, and the confidence that state court

judges take, and should be encouraged to take, their constitutional duties seriously. Second, the rule furthers the interest in the efficiency of federal habeas corpus, by assuring that, in general, the factual and legal bases surrounding a petitioner's constitutional claim or claims will have been developed in a prior adjudication. See generally *Rose* v. *Lundy*, 455 U. S. 509, 518–519 (1982).

To protect these interests we have held that where a federal habeas petitioner raises a claim which has *never* been presented in any state forum, a federal court may properly determine whether the claim has been procedurally defaulted under state law, such that a remedy in state court is "unavailable" within the meaning of § 2254(c). See *Engle* v. *Isaac*, 456 U. S. 107, 125–126, n. 28 (1982). The lower courts have consistently looked to state procedural default rules in making the "availability" determination, both before and after our decision in *Engle*. See, *e. g.*, *Watson* v. *Alabama*, 841 F. 2d 1074, 1077, n. 6 (CA11), cert. denied, 488 U. S. 864 (1988); *Leroy* v. *Marshall*, 757 F. 2d 94, 97 (CA6), cert. denied, 474 U. S. 831 (1985); *Wayne* v. *White*, 735 F. 2d 324, 325 (CA8 1984); *Williams* v. *Duckworth*, 724 F. 2d 1439, 1442 (CA7), cert. denied, 469 U. S. 841 (1984); *Richardson* v. *Turner*, 716 F. 2d 1059, 1061–1062 (CA4 1983); *Beaty* v. *Patton*, 700 F. 2d 110, 112 (CA3 1983); *Jackson* v. *Cupp*, 693 F. 2d 867, 869 (CA9 1982); *Matias* v. *Oshiro*, 683 F. 2d 318, 319–321 (CA9 1982); *Keener* v. *Ridenour*, 594 F. 2d 581, 584 (CA6 1979); *Smith* v. *Estelle*, 562 F. 2d 1006, 1007–1008 (CA5 1977); *United States ex rel. Williams* v. *Brantley*, 502 F. 2d 1383, 1385–1386 (CA7 1974). Indeed, we have reaffirmed and applied the rule of *Engle* in *Teague* v. *Lane*, *post*, at 297–298.

A contrary rule would make no sense. It would require a "plain statement" indicating state reliance on a procedural bar where no state court was ever given the opportunity to pass on either the procedural posture or the merits of the constitutional claim. Moreover, dismissing such petitions

for failure to exhaust state court remedies would often result in a game of judicial ping-pong between the state and federal courts, as the state prisoner returned to state court only to have the state procedural bar invoked against him. See *Fay* v. *Noia*, 372 U. S. 391, 435 (1963); *United States ex rel Williams* v. *Brantley*, *supra*, at 1385–1386 ("We refuse to contribute further needless and delaying requirements to a procedure that already often results in shuttling prisoners back and forth between the state and federal courts before any decision on the merits is ever reached"). Finally, such a rule would create an incentive to proceed immediately to federal court, bypassing state postconviction remedies entirely in the hope that the lack of a state court decision as to the applicability of the State's procedural bar would be treated as "ambiguity." Such a result would not only run counter to the decisions of this Court, see *Rose*, *supra*, at 518–519, but would also frustrate the congressional purpose embodied in § 2254.

In sum, it is simply impossible to "[r]equir[e] a state court to be explicit in its reliance on a procedural default," *ante*, at 264, where a claim raised on federal habeas has never been presented to the state courts at all. In such a context, federal courts quite properly look to, and apply, state procedural default rules in making the congressionally mandated determination whether adequate remedies are available in state court.

My second concern stems from the majority's references to our decisions in *Murray* v. *Carrier*, 477 U. S. 478 (1986), and *Smith* v. *Murray*, 477 U. S. 527 (1986). In these decisions, the Court reaffirmed the holding of *Wainwright* v. *Sykes*, 433 U. S. 72, 90–91 (1977), that a state prisoner pursuing federal habeas remedies must show both "cause" for a procedural default and "prejudice" flowing from the alleged constitutional violation for a federal court to entertain his claim on the merits despite the existence of an otherwise preclusive state-law ground for decision. In *Murray* v. *Carrier*, the Court rejected "a reworking of the cause and prejudice test . . . to

dispense with the requirement that the petitioner show cause and instead to focus exclusively on whether there has been a 'manifest injustice' or a denial of 'fundamental fairness.'" 477 U. S., at 493. The Court went on to indicate that:

> "We remain confident that, for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.' But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Id.*, at 495–496 (citation omitted).

At several points in its opinion, the Court refers to a "miscarriage of justice" test to be applied in conjunction with the cause and prejudice inquiry. See *ante*, at 258, and n. 2; *ante*, at 259, n. 3; *ante*, at 262. I do not read the Court's opinion as suggesting any alteration of the relationship between the cause and prejudice inquiry and the narrow exception to the cause requirement where a petitioner cannot show cause but can make a strong showing of probable factual innocence. See *Smith*, *supra*, at 538–539 ("We similarly reject the suggestion that there is anything 'fundamentally unfair' about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination"). The operative test is cause and prejudice; there is a kind of "safety valve" for the "extraordinary case" where a substantial claim of factual innocence is precluded by an inability to show cause. With this understanding, I join the Court's opinion.

JUSTICE KENNEDY, dissenting.

This case presents the question whether a federal court may entertain a habeas corpus petition, without a showing of cause and prejudice, if the state court to which the federal

claim was presented mentions a procedural default, yet considers also the merits of the claim. The majority holds that federal habeas courts must reach the merits of the federal issue absent explicit reliance on the bar, evidenced by a "plain statement" in the state court's opinion.

Two premises underlie today's holding. First, although the case before us is a federal habeas corpus proceeding, the majority explores whether an ambiguous reference to a state procedural bar would deprive us of jurisdiction in a matter here on direct review. The majority discovers that the rule of *Michigan* v. *Long*, 463 U. S. 1032 (1983), designed for cases where a state court explicitly relies on a state substantive ground that appears to be interwoven with federal law, applies as well in any direct review case where there is ambiguity concerning whether the state court intended to rely on a procedural bar. Thus fortified by its enhanced *Long* rule, the majority turns to the case before us. It stakes out the second premise, which is that direct review and collateral attack cases should be governed by the same rule. The majority therefore concludes that federal habeas courts must apply *Long* in determining whether a state court's reference to a procedural bar triggers the cause-and-prejudice inquiry prescribed by *Wainwright* v. *Sykes*, 433 U. S. 72 (1977). Disagreement with each of the majority's premises elicits my respectful dissent.

I

It is settled law that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210 (1935). The rule was first announced to deny our authority to revise state-court judgments resting on an alternative state substantive ground, *e. g.*, *Murdock* v. *Memphis*, 20 Wall. 590, 636 (1875), and later was extended to bar our direct review of state judgments that rest on ade-

quate and independent state procedural grounds. See, *e. g.*, *Henry* v. *Mississippi*, 379 U. S. 443, 446 (1965); *Herndon* v. *Georgia*, 295 U. S. 441 (1935). It follows that where a state court refuses to consider federal claims owing to a criminal defendant's failure to comply with a state procedural rule that is otherwise adequate and independent, we lack authority to consider the claims on direct review.

Our discussions of this jurisdictional principle have identified circumstances where state procedural grounds are "inadequate" to support the result below, *e. g.*, *Johnson* v. *Mississippi*, 486 U. S. 578, 587–589 (1988); *James* v. *Kentucky*, 466 U. S. 341, 348–349 (1984), and where state procedural grounds cannot be deemed "independent" of the underlying federal rights, *e. g.*, *Ake* v. *Oklahoma*, 470 U. S. 68, 74–75 (1985). An analogous body of doctrine aids us in assessing the independence of state substantive grounds. See, *e. g.*, *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164 (1917). As might be expected in light of the common history and purposes of these doctrines, there is a significant degree of overlap. Our precedents declare, however, that "it is important to distinguish between state substantive grounds and state procedural grounds," *Henry* v. *Mississippi*, 379 U. S., at 446, and caution against the indiscriminate application of principles developed in cases involving state substantive grounds to cases involving procedural defaults. See *id.*, at 447. See also *Wainwright* v. *Sykes*, *supra*, at 81–82. These well-understood principles ensure our respect for the integrity of state-court judgments.

In *Michigan* v. *Long*, *supra*, we considered our jurisdiction to review a judgment of the Supreme Court of Michigan that had ruled a search unlawful. The state court's opinion had relied almost exclusively on federal decisions construing the Fourth Amendment, though it twice cited an analogous state constitutional provision. 463 U. S., at 1043. After a review of our precedents considering whether various forms of references to state law constitute adequate and independent state

grounds, we adopted a presumption in favor of federal review "when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion . . . ." *Id.*, at 1040–1041.

Our resolution of these ambiguities in favor of federal review rested on this critical assumption: When the state court's judgment contains no plain statement to the effect that federal cases are being used solely as persuasive authority, and when state law is interwoven with federal law, we can "accept *as the most reasonable explanation* that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*, at 1041 (emphasis added). Our approach, we added, had the further advantage of not requiring us to interpret state laws with which we are generally unfamiliar. *Id.*, at 1039, 1041.

There may be a persuasive argument for applying *Long* to cases coming to this Court on direct review where the independence of a state procedural ground is in doubt because the state rule is interwoven with federal law. An example would be if "the State has made application of the procedural bar depend on an antecedent ruling of federal law, that is, on the determination of whether federal constitutional error has been committed." *Ake* v. *Oklahoma*, *supra*, at 75. See also *Longshoremen* v. *Davis*, 476 U. S. 380, 388 (1986). But that situation is not presented in the case before us. In Illinois, "a defendant who neglects to raise a claim of inadequate representation on direct appeal may not later assert that claim in a petition for post-conviction relief," *United States ex rel. Devine* v. *DeRobertis*, 754 F. 2d 764, 766, and n. 1 (CA7 1985) (collecting cases), though "strict application of [this] doctrine . . . may be relaxed . . . 'where fundamental fairness so requires.'" *People* v. *Gaines*, 105 Ill. 2d 79, 91, 473 N. E. 2d 868, 875 (1984), cert. denied, 471 U. S. 1131 (1985), quoting *People* v. *Burns*, 75 Ill. 2d 282, 290, 388 N. E. 2d 394, 398

(1979). Petitioner does not claim that federal constitutional analysis is somehow determinative of "fundamental fairness" under Illinois law, or even that uncertainty exists on this point. Under the circumstances, "[t]here is no need for a plain statement indicating the independence of the state grounds since there was no federal law interwoven with this determination." *Pennsylvania* v. *Finley*, 481 U. S. 551, 563 (1987) (BRENNAN, J., dissenting), citing *Michigan* v. *Long*, 463 U. S., at 1041.

The purported ambiguity in this case is much dissimilar from the ambiguity we confronted in *Long*.[1] In *Long* "[t]he references to the State Constitution in no way indicat[ed] that the decision below rested on grounds in any way *independent* from the state court's interpretation of federal law," *id.*, at 1044 (emphasis in original), thus raising the question whether the state court "decided the case the way it did because it believed that federal law required it do so." *Id.*, at 1041. See also *Pennsylvania* v. *Finley*, *supra*, at 570 (STEVENS, J., dissenting). The question in this case does not remotely implicate the independence of the state-law ground from federal law. The alleged ambiguity in the Illinois Appellate Court's opinion relates instead to whether the state ground was invoked at all. The majority does not explain why adopting the *Michigan* v. *Long* presumption in this different context is sensible. It seems to me it is not.

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[1] The rule the majority adopts applies only when there is an "ambiguity" concerning whether the last state court to write an opinion rejecting the applicant's claims intended to rely on a procedural bar. Thus, the presence of an ambiguity on this point is a logical antecedent to the application of the Court's rule. It is not entirely clear whether the majority treats the existence of an ambiguity in this case as a question determined adversely to respondent below (and which the Court is not inclined to revisit), or whether the majority intends to hold that the state court's opinion was actually ambiguous. The former seems the more reasonable reading of the majority's opinion, see *ante*, at 262, n. 8. Although I believe a fair interpretation of the state-court opinion would reveal no ambiguity, I will follow the majority's lead and treat the case as if the opinion were ambiguous.

Applied to this case, the "most reasonable explanation" test of *Michigan* v. *Long* suggests that the Illinois court referred to petitioner's procedural default to rely on it, not because it was an interesting aside. The State's rule is that failure to raise a claim on appeal is a waiver. The rule has an exception, presumably intended to apply to a smaller number of cases than the general rule of waiver, that operates to lift the procedural bar when justice so requires. Other States have adopted procedural default rules of like structure, see, *e. g.*, *Roman* v. *Abrams*, 822 F. 2d 214, 222 (CA2 1987) (discussing analogous New York rule), cert. pending, No. 87–6154, and it may fairly be assumed that most procedural bars are in fact subject to some exception, even if a quite narrow one. There is no empirical or logical support, however, for the view that the most reasonable explanation for a court's reference to the general rule is that the court intends to rely on some exception it does not mention. On the contrary, it is most unreasonable to adopt a rule that assumes either that state courts routinely invoke exceptions to their procedural bars without saying so, or that those courts are in the habit of disregarding their own rules.[2]

Indeed, if the majority's aim is to devise a bright-line rule that will explain best the greatest number of similarly ambiguous state-court opinions, it should announce the mirror image of the rule adopted today. It should presume that the procedural bar was invoked unless the state court, by a "plain

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[2] The majority explains that its new rule does not entail a presumption that state courts disobey their own procedural rules because "[t]he 'plain statement' rule relieves a federal court from having to determine whether in a given case, consistent with state law, the state court has chosen to forgive a procedural default." *Ante*, at 265, n. 11. Of course, the majority's reasoning assumes that in all cases of ambiguity there will always be an exception to the State's procedural bar that is at least arguably applicable to the situation before the federal habeas court. Only if this is true will the majority's new rule not be tantamount to a presumption that state courts disobey their own rules. The Court, however, does not explain why it is reasonable to make this assumption.

statement," specifically relied on an exception. This alternative rule would serve the majority's apparent concern for clarity in equal measure, and would be a far more accurate assessment of the intent of the state court in most cases. This rule would have the additional advantage of not presuming that a state court has disregarded its own laws in those instances where there is either no exception to the bar or an exception that manifestly is inapplicable to the defendant. Cf. *Black* v. *Romano*, 471 U. S. 606, 615 (1985) ("We must presume that the state judge followed [state] law").

It is makeweight and unconvincing, moreover, to justify the majority's extension of *Michigan* v. *Long* on the basis of our interest in avoiding unnecessary inquiries into "state laws with which we are generally unfamiliar." *Michigan* v. *Long*, *supra*, at 1039.[3] This concern is slight when the state-law ground is procedural rather than substantive. The doctrine of adequacy developed in the context of procedural bars already requires us to conduct extensive reviews of questions of state procedural law in order to determine whether the State's "procedural rule is 'strictly or regularly followed,'" *Johnson* v. *Mississippi*, 486 U. S., at 587, quoting *Barr* v. *Columbia*, 378 U. S. 146, 149 (1964), for state courts "may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn* v. *Lovorn*, 457 U. S. 255, 263 (1982). If this Court is institutionally capable of assessing whether a state procedural rule has been applied "evenhandedly to all similar claims," it is certainly capable of assessing

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[3] Our concern in *Long* with the importance of not rendering advisory opinions, 463 U. S., at 1041, is not pertinent in the present context. Procedural default rules differ significantly from substantive state-law grounds in that our decision to reach the underlying federal claim despite a procedural bar cannot result in our rendering an advisory opinion. See *Henry* v. *Mississippi*, 379 U. S. 443, 446–447 (1965).

whether, in any given case, an exception to a procedural bar is applicable and has been invoked.[4]

The Court sidesteps the obvious difficulties of its new rule by stating that our decision in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), already held that any ambiguity concerning whether a state court actually relied on a procedural bar "must be resolved by application of the *Long* standard." *Ante*, at 262. It is true that *Caldwell* addressed the question whether the state court had relied on a procedural bar, and that it referred to *Michigan* v. *Long* in indicating, somewhat obliquely, that the lower court opinion did not contain an explicit statement that the decision was based on state law. 472 U. S., at 327. While *Caldwell* perhaps is not entirely clear on the point, it is difficult to view these statements as announcing conclusively that the *Long* presumption applies in all cases where there is doubt concerning whether a state court intended to rely on a procedural bar.

In any event, our references to the *Long* rule in *Caldwell* were entirely unnecessary to the decision, and the majority's uncritical interpretation of *Caldwell* as controlling authority here is misplaced. In *Caldwell* two reasons persuaded us to reject the State's argument that a procedural bar deprived us of jurisdiction. First, our own review of the state court's opinion persuaded us that it could be "read . . . *only* as meaning that procedural waiver was not the basis of the decision." *Caldwell*, *supra*, at 328 (emphasis added). Because we explicitly found that there was no ambiguity concerning whether the state court intended to rely on the procedural default, our references to *Long* ought not to be interpreted as requiring that *Long* be applied in cases where we are faced with such an ambiguity. Second, our opinion in *Caldwell* noted that Mississippi had not consistently applied

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[4] Indeed, we have recognized that it is perfectly consistent with *Michigan* v. *Long* to conduct certain limited inquiries into state law. See, *e. g.*, *New York* v. *Class*, 475 U. S. 106, 110 (1986); *Ohio* v. *Johnson*, 467 U. S. 493, 497–498, n. 7 (1984).

its procedural bar to capital cases. 472 U. S., at 328. *Caldwell*'s citation of *Michigan* v. *Long* therefore cannot be characterized as holding that a procedural bar will oust this Court of jurisdiction only if the opinion below included the "plain statement" so eagerly sought by today's majority. The State's inconsistent application of its procedural bar would have rendered its bar inadequate in *Caldwell*, even if the state court had explicitly relied on it. See, *e. g.*, *Johnson* v. *Mississippi*, *supra*, at 587–589. *Caldwell* ought not to be interpreted to require application of *Long*'s plain statement rule to the situation before us when the plainest possible statement could not have deprived us of jurisdiction in *Caldwell* itself.

I remain convinced that our reasoning in *Michigan* v. *Long* does not extend to a situation where, as here, there is doubt about whether a state court intended to rely on a procedural bar, but where there is no ambiguity, as there was in *Long*, concerning whether the bar is independent from federal law. Facial ambiguities that relate solely to whether a state court did invoke a procedural bar should not be resolved uncritically in favor of federal review.

II

Even if the majority were correct in concluding that the judgment of the Illinois Appellate Court would have been reviewable in this Court under *Michigan* v. *Long*, it errs in concluding that federal habeas review must also be available. The equivalence the majority finds between direct and collateral review appears to be based on two arguments. First, the majority asserts that *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), "made clear that the adequate and independent state ground doctrine applies on federal habeas." *Ante*, at 262. Second, the Court argues that the "substantial" benefits of extending *Michigan* v. *Long* to the habeas context outweigh any state interests that may be burdened by applying *Long* in this context. Neither argument is persuasive.

Far from supporting the majority's reflexive extension of *Long* to habeas cases, *Wainwright* v. *Sykes* made clear, after an exhaustive review of our precedents, that the adequate and independent state ground doctrine does not "apply" in the habeas context in the manner suggested by the Court today. As *Sykes* noted, our decision in *Fay* v. *Noia*, 372 U. S. 391 (1963), explicitly divorced the doctrines governing our appellate jurisdiction from those governing the power of the federal courts to entertain habeas corpus applications. *Wainwright* v. *Sykes*, *supra*, at 82–83; *Fay* v. *Noia*, 372 U. S., at 425–426, 433–434. Under the view we took of the habeas corpus statute in *Fay*, the state court's reliance on its procedural rule, even if sufficient to preclude direct review of the state-court judgment, could not prevent a federal habeas court from considering the underlying constitutional claim. It was only as a matter of comity that we recognized the principle that habeas review could be denied to an "applicant who ha[d] deliberately by-passed the orderly procedure of the state courts and in so doing ha[d] forfeited his state court remedies." *Id.*, at 438.

Our decision in *Sykes* placed some limits on the expansive regime of *Fay* v. *Noia*, but reaffirmed that comity and federalism are the principles that control the weight that a federal habeas court should accord to a state procedural default. These constitutional concerns, not some mechanical application of the doctrines governing our appellate jurisdiction, formed the basis for our holding that a state procedural default will preclude federal habeas review unless the applicant shows both cause for failing to comply with the State's rule and actual prejudice resulting from the alleged constitutional violation.[5] 433 U. S., at 84–91. Indeed, the majority's re-

[5] Although the majority states that a habeas petitioner may obtain relief by demonstrating that failure to consider the claim will result in a "'fundamental miscarriage of justice,'" *ante*, at 262, it is clear that the majority's reference relates solely to the narrow exception to the "cause" requirement we have recognized for the "extraordinary case, where a constitutional vi-

affirmation of the authority of federal courts to grant habeas relief, notwithstanding a procedural default, on a showing of "cause and prejudice" belies any facile equivalence between direct and collateral review. The significance of *Sykes* for this case has nothing to do with "adequate and independent state grounds," but with principles governing the relationship between federal and state courts that have become an essential part of our judicial federalism.

Because our decision to honor state procedural defaults in habeas cases is intended "to accord appropriate respect to the sovereignty of the States in our federal system," *Ulster County Court* v. *Allen*, 442 U. S. 140, 154 (1979), any determination that a state court did not intend to rely on a procedural default must be made with the same deference to the State's sovereignty that motivates our willingness to honor its procedural rules in the first place. The majority's second argument for extending *Michigan* v. *Long* to the habeas context seems to acknowledge as much, for at least it purports to be guided by those principles of federalism and comity that until now have informed our analysis. *Ante*, at 263–265. The majority's perfunctory discussion of these principles, however, is inadequate to justify its view that extending *Long* will burden state interests "minimally, if at all," *ante*, at 264, while producing "substantial" benefits. *Ibid.* These conclusions, in my view, reflect a miserly assessment of the State's interest and an extravagant notion of the benefits to be derived from extending *Long* to habeas cases.

The majority dismisses the State's interests by positing that state courts have become familiar with the "plain statement" rule under *Long*. One may question whether it is not

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olation has probably resulted in the conviction of one who is actually innocent . . . ." *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986). See *ante*, at 258, n. 2. Because the "fundamental miscarriage of justice" inquiry is a narrow exception to the cause-and-prejudice standard that is limited to claims of factual innocence, I prefer to avoid confusion by not treating it as a separate test.

"unrealistic—and quite unfair—to expect the judges [who must deal with postconviction proceedings in the lower state courts] to acquire and retain familiarity with this Court's jurisprudence concerning the intricacies of our own jurisdiction." *Pennsylvania* v. *Finley*, 481 U. S., at 570 (STEVENS, J., dissenting). In any event, the majority's improvident extension of *Michigan* v. *Long* burdens significant state interests that today's opinion does not even acknowledge. As we emphasized at great length in *Engle* v. *Isaac*, 456 U. S. 107, 126–128 (1982), federal habeas review itself entails significant costs. It disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority. The majority's new rule can only increase the likelihood that these costs will be incurred more often.

The majority's opinion also reflects little consideration of the perverse incentives created by its holding. Because an ambiguous state-court order will ensure access to a federal habeas forum, prisoners whose claims otherwise would be procedurally barred now have every incentive to burden state courts with a never-ending stream of petitions for postconviction relief. Such perseverance may, in due course, be rewarded with a suitably ambiguous rebuff, perhaps a one-line order finding that a prisoner's claim "lacks merit" or stating that relief is "denied." Instead of requiring prisoners to justify their noncompliance with state procedural rules, as contemplated by the cause-and-prejudice standard, the majority's decision openly encourages blatant abuse of state-court processes and circumvention of the standard established in *Sykes*.[6]

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[6] The majority's decision can only increase prisoner litigation and add to the burden on the federal courts in a class of cases that States likely have resolved correctly. It is well known "that prisoner actions occupy a disproportionate amount of the time and energy of the federal judiciary," *Rose* v. *Mitchell*, 443 U. S. 545, 584 (1979) (Powell, J., concurring in judg-

The majority's explanation of the questionable advantages of its new rule does not allay these concerns. The majority appears to think that state procedural rules are so arcane that the federal district courts and courts of appeals should not be burdened with the task of determining their controlling effect. We have recognized, however, that those courts are experts in matters of local law and procedure. See, *e. g.*, *Rummel* v. *Estelle*, 445 U. S. 263, 267, n. 7 (1980) (deferring to the Fifth Circuit's conclusion that petitioner was not procedurally barred under Texas law); *Ulster County Court* v. *Allen*, *supra*, at 153–154 (noting deference owed to the Second Circuit's conclusion that New York court decided constitutional issue on the merits); *Brown* v. *Allen*, 344 U. S. 443, 458 (1953) ("So far as weight to be given the proceedings in the courts of the state is concerned, a United States district court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion"). Indeed, far from regarding decisions of state-law questions as "substantial burdens on the federal courts," *ante*, at 264, our precedents reveal that a federal court's ability to dispose of cases on state-law grounds is an affirmatively desirable means of avoiding, if possible, federal constitutional questions. See, *e. g.*, *Pennhurst State School and Hospital* v. *Halderman*, 465 U. S. 89, 117, 119, n. 28 (1984); *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring); *Delaware* v. *Van Arsdall*, 475 U. S. 673, 693, n. 5 (1986) (STEVENS, J., dissenting). Our limited familiarity with local law may require some relaxation of this salutary principle in this Court,

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ment), and that many of these petitions are entirely frivolous. *Ibid.* In the year ending June 30, 1987, almost 10,000 habeas corpus petitions were filed by state prisoners. See 1987 Annual Report of the Director of the Administrative Office of the United States Courts 179. This monumental burden is unlikely to be alleviated by a rule that, on the dubious assumption that state courts do not enforce even obvious procedural bars, requires federal courts to resolve the merits of defaulted claims.

but the majority offers no sound reason for thinking that the other federal courts are in dire need of such a dispensation, especially when it is conferred at the cost of an undetermined increase in the number of cases to be resolved on the merits.

Even assuming that avoidance of state-law questions is now considered an unalloyed blessing as a general matter, those questions cannot be avoided in federal habeas cases. To cite only the most obvious reason, the habeas statute and our decisions preclude habeas relief "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U. S. C. § 2254(b). See *Granberry* v. *Greer*, 481 U. S. 129, 133–134 (1987); *Picard* v. *Connor*, 404 U. S. 270, 275 (1971); *Ex parte Hawk*, 321 U. S. 114, 116–118 (1944). Our cases recognize that this requirement refers only to remedies still available at the time of the federal habeas petition, and that no such remedies are in fact available if the state courts would refuse to entertain the claim because of a procedural default. *Engle* v. *Isaac*, *supra*, at 125–126, n. 28. Thus, federal habeas courts must become familiar with state rules governing procedural defaults and with the circumstances when exceptions to these rules will be invoked. Because the unequivocal command of § 2254(b) already requires that federal courts become experts on the procedural rules that govern the availability of postconviction relief in the state courts, the majority's assessment of the marginal burdens imposed on federal courts by the need to construe those rules in cases like the one before us can only be described as extravagant.

Our decision in *Engle* v. *Isaac*, *supra*, which the Court strongly reaffirms in this case and in two other cases decided today, *ante*, at 263, n. 9; *Castille* v. *Peoples*, *post*, p. 346; *Teague* v. *Lane*, *post*, p. 288, thus belies the majority's assessment of the benefits of its new rule. *Engle* also

indicates that there is a difficulty even more fundamental with the majority's reasoning. The majority's premise, indeed the driving force of its holding, appears to be that there is *always* a possibility that the state courts will forgive a procedural default irrespective of how clear state law may be to the contrary. But this premise is not credited even by the majority. If this premise were true, *Engle* would be overruled, not reaffirmed. If forgiveness were always a realistic possibility, no federal habeas court could *ever* invoke *Engle*, for no federal court could be sure, in any given case, that the state courts would refuse to consider a federal claim on the basis of the state's procedural default rules.

According to the majority, two different rules will guide the lower courts' consideration of procedural default issues after today. On the one hand, if a defendant presents his claims to the courts of the State, the majority's new rule applies. A federal habeas court faced with an ambiguous state-court opinion *may not* consult state-law sources to determine whether the state court is authorized to forgive the procedural default, or to decide whether the circumstances in which a default may be overlooked consistent with state law are present in the particular case. On the other hand, if a defendant has never attempted to raise his claim in the courts of the State, *Engle* applies. A federal habeas court faced with such a case *must* look to state law to decide whether the petitioner is procedurally barred and whether the state courts are likely to waive his procedural default. The federal court must apply our holding in *Wainwright* v. *Sykes*, 433 U. S. 72 (1977), if the court concludes, on the basis of such review, that the state courts would likely refuse to entertain the petitioner's claim. Yet it is obvious that *Engle* and the rule adopted by the majority in this case are based on irreconcilable assumptions about the regularity and predictability of state procedural rules. And it is not difficult to predict that the lower courts, faced with inconsistent pro-

nouncements from this Court, soon will require us to choose one principle or the other.

Nothing could illustrate this point better than the Court's decision in *Teague* v. *Lane*, *post*, p. 288. The petitioner in *Teague*, like Harris, failed to raise one of his federal constitutional claims on direct appeal in the Illinois courts. Under the same Illinois procedural rule at issue in the present case, the petitioner in *Teague* is barred from raising his claim in collateral proceedings unless fundamental fairness requires that his default be overlooked. Speaking for four Members of the Court, JUSTICE O'CONNOR concludes that the petitioner in *Teague* has exhausted his state remedies because, in view of the limited scope of the fundamental fairness exception, the Illinois courts clearly would refuse to entertain the merits of his claim in collateral proceedings. For the same reason, the *Teague* plurality concludes that the petitioner in that case is procedurally barred. *Teague* v. *Lane*, *post*, at 297–299. Without disagreeing with the plurality's conclusion on these logically antecedent issues, JUSTICE WHITE concurs in the judgment disposing of the case on retroactivity grounds. *Post*, at 317. It appears therefore that five Members of the Court are of the view that it would be entirely futile to remand the case to the Illinois courts because those courts enforce their procedural default rules strictly. The majority does not explain, and I fail to see, how this conclusion can possibly be squared with the majority's adoption of a conclusive presumption to the contrary in the present case.

In sum, the Court's decision to extend *Michigan* v. *Long* to the habeas context ignores important state interests that it is our tradition to honor, and advances no significant federal interest. Indeed, the Court's new rule works against the important federal interests of avoiding, if possible, decisions on federal constitutional claims, and stemming the overwhelming tide of prisoner petitions. Neither logic nor precedent requires this perverse result.

III

The Court of Appeals acknowledged that petitioner properly preserved for federal review the claim that his counsel was ineffective in failing to call alibi witnesses. However, the Court of Appeals failed to address the merits of this claim. Nor did the court inquire whether, with respect to those claims that the court determined to be procedurally barred, petitioner could establish cause and prejudice and thus secure federal habeas review. I would vacate the judgment of the Court of Appeals and remand for further consideration of these matters. Because the Court's remand goes significantly further, I dissent.

TEAGUE *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 87–5259. Argued October 4, 1988—Decided February 22, 1989

Petitioner, a black man, was convicted in an Illinois state court of attempted murder and other offenses by an all-white jury. During jury selection, the prosecutor used all 10 of his peremptory challenges to exclude blacks. Petitioner twice unsuccessfully moved for a mistrial, arguing that he was "entitled to a jury of his peers." The prosecutor defended the challenges by stating that he was trying to achieve a balance of men and women on the jury. After an unsuccessful state-court appeal, in which he argued that the prosecutor's use of peremptory challenges denied him the right to be tried by a jury that was representative of the community, petitioner filed a habeas corpus petition in Federal District Court, repeating his fair cross section claim. He further argued that the opinions of several Justices concurring in, or dissenting from, the denial of certiorari in *McCray* v. *New York*, 461 U. S. 961, had invited a reexamination of *Swain* v. *Alabama*, 380 U. S. 202, as to what a defendant must show to establish a prima facie case of discrimination with respect to a peremptory challenge system. He also argued, for the first time, that under *Swain* a prosecutor could be questioned about his use of peremptory challenges once he volunteered an explanation. The District Court held that it was bound by *Swain* and Circuit precedent and denied relief. A panel of the Court of Appeals agreed with petitioner that the Sixth Amendment's fair cross section requirement that applied to a jury venire also applied to a petit jury, and held that he had made out a prima facie case of discrimination. But the Court of Appeals voted to rehear the case en banc and postponed rehearing until after this Court's decision in *Batson* v. *Kentucky*, 476 U. S. 79. Ultimately, *Batson* was decided and overruled that portion of *Swain* setting forth the evidentiary showing necessary to make out a prima facie case of racial discrimination under the Equal Protection Clause of the Fourteenth Amendment with respect to a peremptory challenge system. *Batson* held that a defendant can establish such a case by showing that he is a "member of a cognizable racial group," that the prosecutor exercised "peremptory challenges to remove from the venire members of the defendant's race," and that these "facts and any other relevant circumstances raise an inference that the prosecutor used that practice to

exclude the veniremen from the petit jury on account of their race." 476 U. S., at 96. The Court of Appeals then held that petitioner could not benefit from the *Batson* rule because in the meantime *Allen* v. *Hardy*, 478 U. S. 255, had held that *Batson* could not be applied retroactively to cases on collateral review. The Court of Appeals also held that petitioner's *Swain* claim was procedurally barred and in any event meritless, and that the fair cross section requirement was limited to the jury venire.

Held: The judgment is affirmed.

820 F. 2d 832, affirmed.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, II, and III, concluding that:

1. *Allen* v. *Hardy* prevented petitioner from benefiting from the rule announced in *Batson*, since his conviction became final before *Batson* was decided. The opinions filed in *McCray*—which involved the question whether the Constitution prohibits the use of peremptory challenges to exclude members of a particular group from the jury, based on the prosecutor's assumption that they would be biased in favor of other members of the same group—did not destroy *Swain*'s precedential effect, as petitioner urges they did, since a denial of certiorari imports no expression of opinion on the merits of the case, and, concomitantly, opinions accompanying such denial cannot have the same effect as decisions on the merits. Pp. 294–296.

2. Petitioner is procedurally barred from raising the claim that he has established a violation of the Equal Protection Clause under *Swain* and that *Swain* did not preclude an examination of the prosecutor's stated reasons for his peremptory challenges to determine the legitimacy of his motive. Since petitioner did not raise the *Swain* claim at trial or on direct appeal, he forfeited review of the claim in collateral proceedings in the state courts. Under *Wainwright* v. *Sykes*, 433 U. S. 72, he is barred from raising the claim in a federal habeas corpus proceeding, since he made no attempt to show cause for his default and the Illinois Appellate Court, contrary to his contention, did not address the *Swain* claim. Pp. 297–299.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY, concluded in Parts IV and V that a decision extending to the petit jury the Sixth Amendment requirement that the jury venire be drawn from a fair cross section of the community would not be applied retroactively to cases on collateral review, and therefore petitioner's fair cross section claim will not be addressed. Pp. 299–316.

(a) Retroactivity is properly treated as a threshold question, for, once a new constitutional rule of criminal procedure is applied to the de-

fendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. Thus, before deciding whether the fair cross section requirement should be extended to the petit jury, it should be determined whether such a rule would be applied retroactively to the case at issue. Pp. 299–305.

(b) Justice Harlan's view that new constitutional rules of criminal procedure generally should not be applied retroactively to cases on collateral review is the appropriate approach. Unless they fall within one of Justice Harlan's suggested exceptions to this general rule—that a new rule should be applied retroactively (1) if it places "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe," *Mackey* v. *United States*, 401 U. S. 667, 692, or (2) if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty,'" *id.*, at 693—such new rules will not be applicable to those cases that have become final before the new rules were announced. Pp. 305–310.

(c) Since petitioner's conviction became final six years ago, the rule he urges would not be applicable to this case, which is on collateral review, unless it falls within one of the above exceptions. The first exception is not relevant here, since application of the fair cross section requirement to the petit jury would not accord constitutional protection to any primary activity. The second exception should be limited in scope to those new procedures without which the likelihood of an accurate conviction is seriously diminished. An examination of the decision in *Taylor* v. *Louisiana*, 419 U. S. 522, applying the fair cross section requirement to the jury venire, leads inexorably to the conclusion that adoption of the rule petitioner urges would be a far cry from the kind of absolute prerequisite to fundamental fairness that is "implicit in the concept of ordered liberty." Because the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction, a rule requiring that petit juries be composed of a fair cross section of the community would not be a "bedrock procedural element" that would be retroactively applied under the second exception. Pp. 311–315.

(d) Were the new rule urged by petitioner recognized, petitioner would have to be given the benefit of that rule even though it would not be applied retroactively to others similarly situated. A new rule will not be announced in a given case unless it would be applied retroactively to the defendant in that case and to all others similarly situated. This not only eliminates any problems of rendering advisory opinions, it also avoids the inequity resulting from an uneven application of new rules to similarly situated defendants. Implicit in the above retroactivity approach is the principle that habeas corpus cannot be used as a vehicle to

create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two articulated exceptions. Pp. 315–316.

JUSTICE WHITE concluded that the result as to nonretroactivity of the fair cross section rule urged by petitioner is an acceptable application in collateral proceedings of the theories embraced in *United States* v. *Johnson*, 457 U. S. 537, *Shea* v. *Louisiana*, 470 U. S. 51, and *Griffith* v. *Kentucky*, 479 U. S. 314, as to retroactivity of new constitutional rules of criminal procedure to all cases pending on direct review. Pp. 316–317.

JUSTICE BLACKMUN concurred in the result insofar as petitioner's claim based on *Swain* v. *Alabama*, 380 U. S. 202, was concerned. P. 318.

JUSTICE STEVENS, joined by JUSTICE BLACKMUN, concluded in Part I that petitioner had alleged a Sixth Amendment violation and that the Court should decide the question in his favor. Nonetheless, petitioner's conviction should not be set aside for, as a matter of *stare decisis*, the Court's opinion in *Allen* v. *Hardy*, 478 U. S. 255, controls disposition of this retroactivity question. In general, the Court should adopt Justice Harlan's analysis of retroactivity for habeas corpus cases as well as for cases still on direct review but without the plurality's "modification" of his fundamental fairness exception. JUSTICE STEVENS concluded in Part II that since petitioner's claim under *Swain* v. *Alabama*, 380 U. S. 202, that the prosecutor violated the Equal Protection Clause by using peremptory challenges to exclude black persons from the jury was never presented to the state courts, it should be treated as an unexhausted claim that is not ripe for review on federal habeas corpus until those courts have spoken. Pp. 318–326.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III, in which REHNQUIST, C. J., and WHITE, SCALIA, and KENNEDY, JJ., joined, the opinion of the Court with respect to Part II, in which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Parts IV and V, in which REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined. WHITE, J., *post*, p. 316, and BLACKMUN, J., *post*, p. 318, filed opinions concurring in part and concurring in the judgment. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, in Part I of which BLACKMUN, J., joined, *post*, p. 318. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 326.

Patricia Unsinn argued the cause for petitioner. With her on the briefs were *Theodore A. Gottfried*, *Michael J. Pelletier*, and *Martin S. Carlson*.

David E. Bindi, Assistant Attorney General of Illinois, argued the cause for respondents. With him on the brief were *Neil F. Hartigan*, Attorney General, *Robert J. Ruiz*, Solicitor General, and *Terence M. Madsen* and *Marcia L. Friedl*, Assistant Attorneys General.*

JUSTICE O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III, and an opinion with respect to Parts IV and V, in which THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join.

In *Taylor* v. *Louisiana*, 419 U. S. 522 (1975), this Court held that the Sixth Amendment required that the jury venire be drawn from a fair cross section of the community. The Court stated, however, that "in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition." *Id.*, at 538. The principal question presented in this case is whether the Sixth Amendment's fair cross section requirement should now be extended to the petit jury. Because we adopt Justice Harlan's approach to retroactivity for cases on collateral review, we leave the resolution of that question for another day.

I

Petitioner, a black man, was convicted by an all-white Illinois jury of three counts of attempted murder, two counts of

*Briefs of *amici curiae* urging reversal were filed for the Lawyers' Committee for Civil Rights Under Law by *Barry Sullivan*, *Barry Levenstam*, *Conrad K. Harper*, *Stuart J. Land*, *Norman Redlich*, *William L. Robinson*, and *Judith A. Winston;* and for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Julius LeVonne Chambers*, *Charles Stephen Ralston*, *John A. Powell*, and *Steven R. Shapiro*.

Kent S. Scheidegger filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

armed robbery, and one count of aggravated battery. During jury selection for petitioner's trial, the prosecutor used all 10 of his peremptory challenges to exclude blacks. Petitioner's counsel used one of his 10 peremptory challenges to exclude a black woman who was married to a police officer. After the prosecutor had struck six blacks, petitioner's counsel moved for a mistrial. The trial court denied the motion. App. 2–3. When the prosecutor struck four more blacks, petitioner's counsel again moved for a mistrial, arguing that petitioner was "entitled to a jury of his peers." *Id.*, at 3. The prosecutor defended the challenges by stating that he was trying to achieve a balance of men and women on the jury. The trial court denied the motion, reasoning that the jury "appear[ed] to be a fair [one]." *Id.*, at 4.

On appeal, petitioner argued that the prosecutor's use of peremptory challenges denied him the right to be tried by a jury that was representative of the community. The Illinois Appellate Court rejected petitioner's fair cross section claim. *People* v. *Teague*, 108 Ill. App. 3d 891, 895–897, 439 N. E. 2d 1066, 1069–1071 (1982). The Illinois Supreme Court denied leave to appeal, and we denied certiorari. 464 U. S. 867 (1983).

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. Petitioner repeated his fair cross section claim, and argued that the opinions of several Justices concurring in, or dissenting from, the denial of certiorari in *McCray* v. *New York*, 461 U. S. 961 (1983), had invited a reexamination of *Swain* v. *Alabama*, 380 U. S. 202 (1965), which prohibited States from purposefully and systematically denying blacks the opportunity to serve on juries. He also argued, for the first time, that under *Swain* a prosecutor could be questioned about his use of peremptory challenges once he volunteered an explanation. The District Court, though sympathetic to petitioner's arguments, held that it was bound by *Swain* and Circuit precedent. App. 5–6.

On appeal, petitioner repeated his fair cross section claim and his *McCray* argument. A panel of the Court of Appeals agreed with petitioner that the Sixth Amendment's fair cross section requirement applied to the petit jury and held that petitioner had made out a prima facie case of discrimination. A majority of the judges on the Court of Appeals voted to rehear the case en banc, and the panel opinion was vacated. *United States ex rel. Teague* v. *Lane*, 779 F. 2d 1332 (CA7 1985) (en banc) (Cudahy, J., dissenting). Rehearing was postponed until after our decision in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), which overruled a portion of *Swain*. After *Batson* was decided, the Court of Appeals held that petitioner could not benefit from the rule in that case because *Allen* v. *Hardy*, 478 U. S. 255 (1986) *(per curiam)*, had held that *Batson* would not be applied retroactively to cases on collateral review. 820 F. 2d 832, 834, n. 4 (CA7 1987) (en banc). The Court of Appeals also held that petitioner's *Swain* claim was procedurally barred and in any event meritless. *Id.*, at 834, n. 6. The Court of Appeals rejected petitioner's fair cross section claim, holding that the fair cross section requirement was limited to the jury venire. *Id.*, at 834–843. Judge Cudahy dissented, arguing that the fair cross section requirement should be extended to the petit jury. *Id.*, at 844.

II

Petitioner's first contention is that he should receive the benefit of our decision in *Batson* even though his conviction became final before *Batson* was decided. Before addressing petitioner's argument, we think it helpful to explain how *Batson* modified *Swain*. *Swain* held that a "State's purposeful or deliberate denial" to blacks of an opportunity to serve as jurors solely on account of race violates the Equal Protection Clause of the Fourteenth Amendment. 380 U. S., at 203–204. In order to establish a prima facie case of discrimination under *Swain*, a defendant had to demonstrate that the peremptory challenge system had been "perverted."

A defendant could raise an inference of purposeful discrimination if he showed that the prosecutor in the county where the trial was held "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," has been responsible for the removal of qualified blacks who had survived challenges for cause, with the result that no blacks ever served on petit juries. *Id.*, at 223.

In *Batson*, the Court overruled that portion of *Swain* setting forth the evidentiary showing necessary to make out a prima facie case of racial discrimination under the Equal Protection Clause. The Court held that a defendant can establish a prima facie case by showing that he is a "member of a cognizable racial group," that the prosecutor exercised "peremptory challenges to remove from the venire members of the defendant's race," and that those "facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." 476 U. S., at 96. Once the defendant makes out a prima facie case of discrimination, the burden shifts to the prosecutor "to come forward with a neutral explanation for challenging black jurors." *Id.*, at 97.

In *Allen* v. *Hardy*, the Court held that *Batson* constituted an "explicit and substantial break with prior precedent" because it overruled a portion of *Swain*. 478 U. S., at 258. Employing the retroactivity standard of *Linkletter* v. *Walker*, 381 U. S. 618, 636 (1965), the Court concluded that the rule announced in *Batson* should not be applied retroactively on collateral review of convictions that became final before *Batson* was announced. The Court defined final to mean a case "'where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in' *Batson* . . . ." 478 U. S., at 258, n. 1 (citation omitted).

Petitioner's conviction became final 2½ years prior to *Batson*, thus depriving petitioner of any benefit from the rule

announced in that case. Petitioner argues, however, that *Batson* should be applied retroactively to all cases pending on direct review at the time certiorari was denied in *McCray* because the opinions filed in *McCray* destroyed the precedential effect of *Swain*. Brief for Petitioner 23. The issue in *McCray* and its companion cases was whether the Constitution prohibited the use of peremptory challenges to exclude members of a particular group from the jury, based on the prosecutor's assumption that they would be biased in favor of other members of that same group. JUSTICES MARSHALL and BRENNAN dissented from the denial of certiorari, expressing the views that *Swain* should be reexamined and that the conduct complained of violated a defendant's Sixth Amendment right to be tried by an impartial jury drawn from a fair cross section of the community. 461 U. S., at 964–970. JUSTICES STEVENS, BLACKMUN, and Powell concurred in the denial of certiorari. They agreed that the issue was an important one, but stated that it was a "sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed." *Id.*, at 963.

We reject the basic premise of petitioner's argument. As we have often stated, the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States* v. *Carver*, 260 U. S. 482, 490 (1923) (Holmes, J.). Accord, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U. S. 363, 366, n. 1 (1973); *Brown* v. *Allen*, 344 U. S. 443, 489–497 (1953). The "variety of considerations [that] underlie denials of the writ," *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 917 (1950) (opinion of Frankfurter, J.), counsels against according denials of certiorari any precedential value. Concomitantly, opinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits. We find that *Allen* v. *Hardy* is dispositive, and that petitioner cannot benefit from the rule announced in *Batson*.

III

Petitioner's second contention is that he has established a violation of the Equal Protection Clause under *Swain*. Recognizing that he has not shown any systematic exclusion of blacks from petit juries in case after case, petitioner contends that when the prosecutor volunteers an explanation for the use of his peremptory challenges, *Swain* does not preclude an examination of the stated reasons to determine the legitimacy of the prosecutor's motive. Brief for Petitioner 35 (citing *Batson*, 476 U. S., at 101, n. (WHITE, J., concurring)). See *Weathersby* v. *Morris*, 708 F. 2d 1493, 1495–1496 (CA9 1983) (supporting petitioner's interpretation of *Swain*), cert. denied, 464 U. S. 1046 (1984).

Petitioner candidly admits that he did not raise the *Swain* claim at trial or on direct appeal. Brief for Petitioner 38–39. Because of this failure, petitioner has forfeited review of the claim in the Illinois courts. "It is well established that 'where an appeal was taken from a conviction, the judgment of the reviewing court is *res judicata* as to all issues actually raised, and those that could have been presented but were not are deemed waived.'" *People* v. *Gaines*, 105 Ill. 2d 79, 87–88, 473 N. E. 2d 868, 873 (1984) (citation omitted), cert. denied, 471 U. S. 1131 (1985). The default prevents petitioner from raising the *Swain* claim in collateral proceedings under the Illinois Post-Conviction Hearing Act, Ill. Rev. Stat., ch. 38, ¶ 122–1 *et seq.* (1987), unless fundamental fairness requires that the default be overlooked. *People* v. *Brown*, 52 Ill. 2d 227, 230, 287 N. E. 2d 663, 665 (1972).

The fundamental fairness exception is a narrow one, and has been applied in limited circumstances. Compare *People* v. *Goerger*, 52 Ill. 2d 403, 406, 288 N. E. 2d 416, 418 (1972) (improper instruction on reasonable doubt "does not constitute such fundamental unfairness as to obviate the *res judicata* and waiver doctrines"), with *People* v. *Ikerd*, 47 Ill. 2d 211, 212, 265 N. E. 2d 120, 121 (1970) (fundamental fairness exception applies "where the right relied on has been

recognized for the first time after the direct appeal"), and *People* v. *Hamby*, 32 Ill. 2d 291, 294–295, 205 N. E. 2d 456, 458 (1965) (fundamental fairness exception applies to claims that defendant asked counsel to raise on direct appeal). It is clear that collateral relief would be unavailable to petitioner. See *People* v. *Beamon*, 31 Ill. App. 3d 145, 145–146, 333 N. E. 2d 575, 575–576 (1975) (abstract of decision) (not invoking fundamental fairness exception and holding that *Swain* claim not raised on direct appeal could not be raised for the first time in collateral proceedings). As a result, petitioner has exhausted his state remedies under 28 U. S. C. § 2254(b) with respect to the *Swain* claim. See *Engle* v. *Isaac*, 456 U. S. 107, 125–126, n. 28 (1982); *United States ex rel. Williams* v. *Brantley*, 502 F. 2d 1383, 1385–1386 (CA7 1974).

Under *Wainwright* v. *Sykes*, 433 U. S. 72, 87–91 (1977), petitioner is barred from raising the *Swain* claim in a federal habeas corpus proceeding unless he can show cause for the default and prejudice resulting therefrom. See *Engle* v. *Isaac*, *supra*, at 113–114, 117, 124–135 (applying procedural default rule to claim that had never been raised in state court). Petitioner does not attempt to show cause for his default. Instead, he argues that the claim is not barred because it was addressed by the Illinois Appellate Court. Cf. *Caldwell* v. *Mississippi*, 472 U. S. 320, 327–328 (1985). We cannot agree with petitioner's argument. The Illinois Appellate Court rejected petitioner's Sixth Amendment fair cross section claim *without* mentioning the Equal Protection Clause on which *Swain* was based or discussing whether *Swain* allows a prosecutor to be questioned about his use of peremptory challenges once he volunteers an explanation. See *People* v. *Teague*, 108 Ill. App. 3d, at 895–896, 439 N. E. 2d, at 1070. Accordingly, we hold that petitioner's *Swain* claim is procedurally barred, and do not address its merits.

Our application of the procedural default rule here is consistent with *Harris* v. *Reed*, *ante*, at 263, which holds that a "procedural default does not bar consideration of a federal

claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar" (citations and internal quotations omitted). The rule announced in *Harris* v. *Reed* assumes that a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding. It is simply inapplicable in a case such as this one, where the claim was never presented to the state courts. See *ante*, at 268–270 (O'CONNOR, J., concurring).

IV

Petitioner's third and final contention is that the Sixth Amendment's fair cross section requirement applies to the petit jury. As we noted at the outset, *Taylor* expressly stated that the fair cross section requirement does not apply to the petit jury. See 419 U. S., at 538. Petitioner nevertheless contends that the *ratio decidendi* of *Taylor* cannot be limited to the jury venire, and he urges adoption of a new rule. Because we hold that the rule urged by petitioner should not be applied retroactively to cases on collateral review, we decline to address petitioner's contention.

A

In the past, the Court has, without discussion, often applied a new constitutional rule of criminal procedure to the defendant in the case announcing the new rule, and has confronted the question of retroactivity later when a different defendant sought the benefit of that rule. See, *e. g.*, *Brown* v. *Louisiana*, 447 U. S. 323 (1980) (addressing retroactivity of *Burch* v. *Louisiana*, 441 U. S. 130 (1979)); *Robinson* v. *Neil*, 409 U. S. 505 (1973) (addressing retroactivity of *Waller* v. *Florida*, 397 U. S. 387 (1970)); *Stovall* v. *Denno*, 388 U. S. 293 (1967) (addressing retroactivity of *United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967)); *Tehan* v. *Shott*, 382 U. S. 406 (1966) (addressing retroactivity of *Griffin* v. *California*, 380 U. S. 609

(1965)). In several cases, however, the Court has addressed the retroactivity question in the very case announcing the new rule. See *Morrissey* v. *Brewer*, 408 U. S. 471, 490 (1972); *Witherspoon* v. *Illinois*, 391 U. S. 510, 523, n. 22 (1968). These two lines of cases do not have a unifying theme, and we think it is time to clarify how the question of retroactivity should be resolved for cases on collateral review.

The question of retroactivity with regard to petitioner's fair cross section claim has been raised only in an *amicus* brief. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* 22–24. Nevertheless, that question is not foreign to the parties, who have addressed retroactivity with respect to petitioner's *Batson* claim. See Brief for Petitioner 21–32; Brief for Respondent 31–38. Moreover, our *sua sponte* consideration of retroactivity is far from novel. In *Allen* v. *Hardy*, we addressed the retroactivity of *Batson* even though that question had not been presented by the petition for certiorari or addressed by the lower courts. See 478 U. S., at 261–262 (MARSHALL, J., dissenting). See also *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961) (applying exclusionary rule to the States even although such a course of action was urged only by *amicus curiae*).

In our view, the question "whether a decision [announcing a new rule should] be given prospective or retroactive effect should be faced at the time of [that] decision." Mishkin, Foreword: the High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 64 (1965). Cf. *Bowen* v. *United States*, 422 U. S. 916, 920 (1975) (when "issues of both retroactivity and application of constitutional doctrine are raised," the retroactivity issue should be decided first). Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. Thus, before deciding whether the fair cross section require-

ment should be extended to the petit jury, we should ask whether such a rule would be applied retroactively to the case at issue. This retroactivity determination would normally entail application of the *Linkletter* standard, but we believe that our approach to retroactivity for cases on collateral review requires modification.

It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. See, *e. g.*, *Rock* v. *Arkansas*, 483 U. S. 44, 62 (1987) (*per se* rule excluding all hypnotically refreshed testimony infringes impermissibly on a criminal defendant's right to testify on his behalf); *Ford* v. *Wainwright*, 477 U. S. 399, 410 (1986) (Eighth Amendment prohibits the execution of prisoners who are insane). To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. See generally *Truesdale* v. *Aiken*, 480 U. S. 527, 528–529 (1987) (Powell, J., dissenting). Given the strong language in *Taylor* and our statement in *Akins* v. *Texas*, 325 U. S. 398, 403 (1945), that "[f]airness in [jury] selection has never been held to require proportional representation of races upon a jury," application of the fair cross section requirement to the petit jury would be a new rule.[1]

[1] The dissent asserts that petitioner's fair cross section claim does not embrace the concept of proportional representation on the petit jury. *Post*, at 340–342. Although petitioner disavows such representation at the beginning of his brief, he later advocates adoption of the standard set forth in *Duren* v. *Missouri*, 439 U. S. 357 (1979), as a way of determining whether there has been a violation of the fair cross section requirement. See Brief for Petitioner 15–16. In order to establish a prima facie violation of the fair cross section requirement under *Duren*, a defendant must show: (1) that the "group alleged to be excluded is a 'distinctive' group in the community"; (2) that the representation of the group "is not

Not all new rules have been uniformly treated for retroactivity purposes. Nearly a quarter of a century ago, in *Linkletter*, the Court attempted to set some standards by which to determine the retroactivity of new rules. The question in *Linkletter* was whether *Mapp* v. *Ohio*, which made the exclusionary rule applicable to the States, should be applied retroactively to cases on collateral review. The Court determined that the retroactivity of *Mapp* should be determined by examining the purpose of the exclusionary rule, the reliance of the States on prior law, and the effect on the administration of justice of a retroactive application of the exclusionary rule. Using that standard, the Court held that *Mapp* would only apply to trials commencing after that case was decided. 381 U. S., at 636–640.

The *Linkletter* retroactivity standard has not led to consistent results. Instead, it has been used to limit application of certain new rules to cases on direct review, other new rules only to the defendants in the cases announcing such rules, and still other new rules to cases in which trials have not yet commenced. See *Desist* v. *United States*, 394 U. S. 244, 256–257 (1969) (Harlan, J., dissenting) (citing examples).

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fair and reasonable in relation to the number of such persons in the community"; and (3) that the underrepresentation of the group "is due to systematic exclusion of the group in the jury-selection process." 439 U. S., at 364. The second prong of *Duren* is met by demonstrating that the group is underrepresented in proportion to its position in the community as documented by census figures. *Id.*, at 364–366. If petitioner must meet this prong of *Duren* to prevail, it is clear that his fair cross section claim is properly characterized as requiring "fair and reasonable" proportional representation on the petit jury. Petitioner recognizes this, as he compares the percentage of blacks in his petit jury to the percentage of blacks in the population of Cook County, Illinois, from which the petit jury was drawn. See Brief for Petitioner 17–18 (arguing that blacks were underrepresented on petitioner's petit jury by 25.62%). In short, the very standard that petitioner urges us to adopt includes, and indeed requires, the sort of proportional analysis we declined to endorse in *Akins* v. *Texas*, 325 U. S. 398, 403 (1945), and *Taylor* v. *Louisiana*, 419 U. S. 522, 538 (1975).

Not surprisingly, commentators have "had a veritable field day" with the *Linkletter* standard, with much of the discussion being "more than mildly negative." Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L. Rev. 1557, 1558, and n. 3 (1975) (citing sources).

Application of the *Linkletter* standard led to the disparate treatment of similarly situated defendants on direct review. For example, in *Miranda* v. *Arizona*, 384 U. S. 436, 467–473 (1966), the Court held that, absent other effective measures to protect the Fifth Amendment privilege against self-incrimination, a person in custody must be warned prior to interrogation that he has certain rights, including the right to remain silent. The Court applied that new rule to the defendants in *Miranda* and its companion cases, and held that their convictions could not stand because they had been interrogated without the proper warnings. *Id.*, at 491–499. In *Johnson* v. *New Jersey*, 384 U. S. 719, 733–735 (1966), the Court held, under the *Linkletter* standard, that *Miranda* would only be applied to trials commencing after that decision had been announced. Because the defendant in *Johnson*, like the defendants in *Miranda*, was on direct review of his conviction, see 384 U. S., at 721, the Court's refusal to give *Miranda* retroactive effect resulted in unequal treatment of those who were similarly situated. This inequity also generated vehement criticism. See, *e. g.*, A. Bickel, The Supreme Court and the Idea of Progress 54–57 (1978) (decrying the "plain" injustice in *Johnson* and suggesting that the Court should have distinguished between direct and collateral review for purposes of retroactivity).

Dissatisfied with the *Linkletter* standard, Justice Harlan advocated a different approach to retroactivity. He argued that new rules should always be applied retroactively to cases on direct review, but that generally they should not be applied retroactively to criminal cases on collateral review. See *Mackey* v. *United States*, 401 U. S. 667, 675 (1971) (opin-

ion concurring in judgments in part and dissenting in part); *Desist*, 394 U. S., at 256 (dissenting opinion).

In *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), we rejected as unprincipled and inequitable the *Linkletter* standard for cases pending on direct review at the time a new rule is announced, and adopted the first part of the retroactivity approach advocated by Justice Harlan. We agreed with Justice Harlan that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U. S., at 322. We gave two reasons for our decision. First, because we can only promulgate new rules in specific cases and cannot possibly decide all cases in which review is sought, "the integrity of judicial review" requires the application of the new rule to "all similar cases pending on direct review." *Id.*, at 323. We quoted approvingly from Justice Harlan's separate opinion in *Mackey*, *supra*, at 679:

> "'If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.'" 479 U. S., at 323.

Second, because "selective application of new rules violates the principle of treating similarly situated defendants the same," we refused to continue to tolerate the inequity that resulted from not applying new rules retroactively to defendants whose cases had not yet become final. *Id.*, at 323–324 (citing *Desist*, *supra*, at 258–259 (Harlan, J., dissenting)). Although new rules that constituted clear breaks with the past generally were not given retroactive effect under the *Linkletter* standard, we held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all

cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 479 U. S., at 328.

The *Linkletter* standard also led to unfortunate disparity in the treatment of similarly situated defendants on collateral review. An example will best illustrate the point. In *Edwards* v. *Arizona*, 451 U. S. 477, 484–487 (1981), the Court held that once a person invokes his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be inferred from the fact that the person responded to police-initiated questioning. It was not until *Solem* v. *Stumes*, 465 U. S. 638 (1984), that the Court held, under the *Linkletter* standard, that *Edwards* was not to be applied retroactively to cases on collateral review. In the interim, several lower federal courts had come to the opposite conclusion and had applied *Edwards* to cases that had become final before that decision was announced. See *Witt* v. *Wainwright*, 714 F. 2d 1069, 1072–1074 (CA11 1983); *Sockwell* v. *Maggio*, 709 F. 2d 341, 343–344 (CA5 1983); *McCree* v. *Housewright*, 689 F. 2d 797, 800–802 (CA8 1982), cert. denied *sub nom. McCree* v. *Lockhart*, 460 U. S. 1088 (1983). Thus, some defendants on collateral review whose *Edwards* claims were adjudicated prior to *Stumes* received the benefit of *Edwards*, while those whose *Edwards* claims had not been addressed prior to *Stumes* did not. This disparity in treatment was a product of two factors: our failure to treat retroactivity as a threshold question and the *Linkletter* standard's inability to account for the nature and function of collateral review. Having decided to rectify the first of those inadequacies, see *supra*, at 300–301, we now turn to the second.

B

Justice Harlan believed that new rules generally should not be applied retroactively to cases on collateral review. He argued that retroactivity for cases on collateral review could "be responsibly [determined] only by focusing, in the first in-

stance, on the nature, function, and scope of the adjudicatory process in which such cases arise. The relevant frame of reference, in other words, is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available." *Mackey*, 401 U. S., at 682 (opinion concurring in judgments in part and dissenting in part). With regard to the nature of habeas corpus, Justice Harlan wrote:

> "Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed." *Id.* at 682–683.

Given the "broad scope of constitutional issues cognizable on habeas," Justice Harlan argued that it is "sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation." *Id.*, at 689. As he had explained in *Desist*, "the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." 394 U. S., at 262–263. See also *Stumes*, 465 U. S., at 653 (Powell, J., concurring in judgment) ("Review on habeas to determine that the conviction rests upon correct application of the

law in effect at the time of the conviction is all that is required to 'forc[e] trial and appellate courts . . . to toe the constitutional mark'") (citation omitted).

Justice Harlan identified only two exceptions to his general rule of nonretroactivity for cases on collateral review. First, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Mackey*, 401 U. S., at 692. Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Id.*, at 693 (quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937) (Cardozo, J.)).

Last Term, in *Yates* v. *Aiken*, 484 U. S. 211 (1988), we were asked to decide whether the rule announced in *Francis* v. *Franklin*, 471 U. S. 307 (1985), should be applied to a defendant on collateral review at the time that case was decided. We held that *Francis* did not announce a new rule because it "was merely an application of the principle that governed our decision in *Sandstrom* v. *Montana* [,442 U. S. 510 (1979)], which had been decided before [the defendant's] trial took place." 484 U. S., at 216–217. We therefore found it unnecessary to adopt Justice Harlan's view of retroactivity for cases on collateral review. We stated, however, that our recent decisions had noted, as had Justice Harlan, "the important distinction between direct review and collateral review." *Id.*, at 215. See also *Pennsylvania* v. *Finley*, 481 U. S. 551, 555 (1987) (distinguishing between direct and collateral review for purposes of Sixth Amendment right to counsel on appeal). Indeed, we have expressly reconciled some of our retroactivity decisions with Justice Harlan's approach. See *Shea* v. *Louisiana*, 470 U. S. 51, 58, n. 4 (1985) (giving *Edwards* retroactive effect on direct, but not collateral, review "is fully congruent with both aspects of the approach to retroactivity propounded by Justice Harlan").

We agree with Justice Harlan's description of the function of habeas corpus. "[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error." *Kuhlmann* v. *Wilson*, 477 U. S. 436, 447 (1986) (plurality opinion). Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review. Thus, if a defendant fails to comply with state procedural rules and is barred from litigating a particular constitutional claim in state court, the claim can be considered on federal habeas only if the defendant shows cause for the default and actual prejudice resulting therefrom. See *Wainwright* v. *Sykes*, 433 U. S., at 87–91. We have declined to make the application of the procedural default rule dependent on the magnitude of the constitutional claim at issue, see *Engle* v. *Isaac*, 456 U. S., at 129, or on the State's interest in the enforcement of its procedural rule, see *Murray* v. *Carrier*, 477 U. S. 478, 493–496 (1986).

This Court has not "always followed an unwavering line in its conclusions as to the availability of the Great Writ. Our development of the law of federal habeas corpus has been attended, seemingly, with some backing and filling." *Fay* v. *Noia*, 372 U. S. 391, 411–412 (1963). See also *Stone* v. *Powell*, 428 U. S. 465, 475–476 (1976). Nevertheless, it has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule. In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940), the Court held that a judgment based on a jurisdictional statute later found to be unconstitutional could have res judicata effect. The Court based its decision in large part on finality concerns. "The actual existence of a statute, prior to such a determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judical declaration. . . . Questions of

. . . prior determinations deemed to have finality and acted upon accordingly . . . demand examination." *Id.*, at 374. Accord, *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 415 (1923) ("Unless and until . . . reversed or modified" on appeal, an erroneous constitutional decision is "an effective and conclusive adjudication"); *Thompson* v. *Tolmie*, 2 Pet. 157, 169 (1829) (errors or mistakes of court with competent jurisdiction "cannot be corrected or examined when brought up collaterally").

These underlying considerations of finality find significant and compelling parallels in the criminal context. Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*." Friendly, Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments, 38 U. Chi. L. Rev. 142, 150 (1970). "[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 450–451 (1963) (emphasis omitted). See also *Mackey*, 401 U. S., at 691 (Harlan, J., concurring in judgments in part and dissenting in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation").

As explained by Professor Mishkin:

> "From this aspect, the *Linkletter* problem becomes not so much one of prospectivity or retroactivity of the rule but rather of the availability of collateral attack—in

> [that] case federal habeas corpus—to go behind the otherwise final judgment of conviction. . . . For the potential availability of collateral attack is what created the 'retroactivity' problem of *Linkletter* in the first place; there seems little doubt that without that possibility the Court would have given short shrift to any arguments for 'prospective limitation' of the *Mapp* rule." Foreword, 79 Harv. L. Rev., at 77–78 (footnote omitted).

See also Bender, The Retroactive Effect of an Overruling Constitutional Decision: *Mapp* v. *Ohio*, 110 U. Pa. L. Rev. 650, 655–656 (1962).

The "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application." *Stumes*, 465 U. S., at 654 (Powell, J., concurring in judgment). In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, cf. *Younger* v. *Harris*, 401 U. S. 37, 43–54 (1971), for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards. Furthermore, as we recognized in *Engle* v. *Isaac*, "[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands." 456 U. S., at 128, n. 33. See also *Brown* v. *Allen*, 344 U. S., at 534 (Jackson, J., concurring in result) (state courts cannot "anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them").

We find these criticisms to be persuasive, and we now adopt Justice Harlan's view of retroactivity for cases on collateral review. Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.

V

Petitioner's conviction became final in 1983. As a result, the rule petitioner urges would not be applicable to this case, which is on collateral review, unless it would fall within an exception.

The first exception suggested by Justice Harlan—that a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Mackey*, 401 U. S., at 692 (opinion concurring in judgments in part and dissenting in part)—is not relevant here. Application of the fair cross section requirement to the petit jury would not accord constitutional protection to any primary activity whatsoever.

The second exception suggested by Justice Harlan—that a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty,'" *id.*, at 693 (quoting *Palko*, 302 U. S., at 325)—we apply with a modification. The language used by Justice Harlan in *Mackey* leaves no doubt that he meant the second exception to be reserved for watershed rules of criminal procedure:

> "Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction. For example, such, in my view, is the case with the right to counsel at trial now held a necessary condition precedent to any conviction

for a serious crime." 401 U. S., at 693–694 (emphasis added).

In *Desist*, Justice Harlan had reasoned that one of the two principal functions of habeas corpus was "to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted," and concluded "from this that all 'new' constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas." 394 U. S., at 262. In *Mackey*, Justice Harlan gave three reasons for shifting to the less defined *Palko* approach. First, he observed that recent precedent, particularly *Kaufman* v. *United States*, 394 U. S. 217 (1969) (permitting Fourth Amendment claims to be raised on collateral review), led "ineluctably . . . to the conclusion that it is not a principal purpose of the writ to inquire whether a criminal convict did in fact commit the deed alleged." 401 U. S., at 694. Second, he noted that cases such as *Coleman* v. *Alabama*, 399 U. S. 1 (1970) (invalidating lineup procedures in the absence of counsel), gave him reason to doubt the marginal effectiveness of claimed improvements in factfinding. 401 U. S., at 694–695. Third, he found "inherently intractable the purported distinction between those new rules that are designed to improve the factfinding process and those designed principally to further other values." *Id.*, at 695.

We believe it desirable to combine the accuracy element of the *Desist* version of the second exception with the *Mackey* requirement that the procedure at issue must implicate the fundamental fairness of the trial. Were we to employ the *Palko* test without more, we would be doing little more than importing into a very different context the terms of the debate over incorporation. Compare *Duncan* v. *Louisiana*, 391 U. S. 145, 171–193 (1968) (Harlan, J., dissenting), with *Adamson* v. *California*, 332 U. S. 46, 68–92 (1947) (Black, J., dissenting). Reviving the *Palko* test now, in this area of law, would be unnecessarily anachronistic. Cf. *Benton* v.

Maryland, 395 U. S. 784, 794–795 (1969) (overruling *Palko* and incorporating the Double Jeopardy Clause). Moreover, since *Mackey* was decided, our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review. See, *e. g.*, *Kuhlmann* v. *Wilson*, 477 U. S., at 454 (plurality opinion) (a successive habeas petition may be entertained only if the defendant makes a "colorable claim of factual innocence"); *Murray* v. *Carrier*, 477 U. S., at 496 ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default"); *Stone* v. *Powell*, 428 U. S., at 491–492, n. 31 (removing Fourth Amendment claims from the scope of federal habeas review if the State has provided a full and fair opportunity for litigation creates no danger of denying a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty"). Finally, we believe that Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.

Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge. We are also of the view that such rules are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Rose* v.

Lundy, 455 U. S. 509, 544 (1982) (STEVENS, J., dissenting) (footnotes omitted).[2]

An examination of our decision in *Taylor* applying the fair cross section requirement to the jury venire leads inexorably to the conclusion that adoption of the rule petitioner urges would be a far cry from the kind of absolute prerequisite to fundamental fairness that is "implicit in the concept of ordered liberty." The requirement that the jury venire be composed of a fair cross section of the community is based on the role of the jury in our system. Because the purpose of the jury is to guard against arbitrary abuses of power by interposing the commonsense judgment of the community between the State and the defendant, the jury venire cannot be composed only of special segments of the population. "Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." *Taylor*, 419 U. S., at 530. But as we stated in *Daniel* v. *Louisiana*, 420 U. S. 31, 32 (1975), which held that *Taylor* was not to be given retroactive effect, the fair cross section requirement "[does] not

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[2] Because petitioner is not under sentence of death, we need not, and do not, express any views as to how the retroactivity approach we adopt today is to be applied in the capital sentencing context. We do, however, disagree with JUSTICE STEVENS' suggestion that the finality concerns underlying Justice Harlan's approach to retroactivity are limited to "making convictions final," and are therefore "wholly inapplicable to the capital sentencing context." *Post*, at 321, n. 3. As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant. See generally *Flynt* v. *Ohio*, 451 U. S. 619, 620 (1981) *(per curiam)*. Collateral challenges to the sentence in a capital case, like collateral challenges to the sentence in a noncapital case, delay the enforcement of the judgment at issue and decrease the possibility that "there will at some point be the certainty that comes with an end to litigation." *Sanders* v. *United States*, 373 U. S. 1, 25 (1963) (Harlan, J., dissenting). Cf. U. S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment 1987, p. 9 (1988) (table 10) (for the 10-year period from 1977–1987, the average elapsed time from the imposition of a capital sentence to execution was 77 months).

rest on the premise that every criminal trial, or any particular trial, [is] necessarily unfair because it [is] not conducted in accordance with what we determined to be the requirements of the Sixth Amendment." Because the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction, we conclude that a rule requiring that petit juries be composed of a fair cross section of the community would not be a "bedrock procedural element" that would be retroactively applied under the second exception we have articulated.

Were we to recognize the new rule urged by petitioner in this case, we would have to give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated. In the words of JUSTICE BRENNAN, such an inequitable result would be "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." *Stovall* v. *Denno*, 388 U. S., at 301. But the harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment "hardly comports with the ideal of 'administration of justice with an even hand.'" *Hankerson* v. *North Carolina*, 432 U. S. 233, 247 (1977) (Powell, J., concurring in judgment) (quoting *Desist*, 394 U. S., at 255 (Douglas, J., dissenting)). See also *Fuller* v. *Alaska*, 393 U. S. 80, 82 (1968) (Douglas, J., dissenting) (if a rule is applied to the defendant in the case announcing the rule, it should be applied to all others similarly situated). Our refusal to allow such disparate treatment in the direct review context led us to adopt the first part of Justice Harlan's retroactivity approach in *Griffith*. "The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule." 479 U. S., at 327–328.

If there were no other way to avoid rendering advisory opinions, we might well agree that the inequitable treatment described above is "an insignificant cost for adherence to sound principles of decision-making." *Stovall* v. *Denno*, 388 U. S., at 301. But there is a more principled way of dealing with the problem. We can simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated. Cf. *Bowen* v. *United States*, 422 U. S., at 920 ("This Court consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive. This practice is rooted in our reluctance to decide constitutional questions unnecessarily") (citations omitted). We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven application of new rules to similarly situated defendants. We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated. Because a decision extending the fair cross section requirement to the petit jury would not be applied retroactively to cases on collateral review under the approach we adopt today, we do not address petitioner's claim.

For the reasons set forth above, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE WHITE, concurring in part and concurring in the judgment.

I join Parts I, II, and III of JUSTICE O'CONNOR's opinion. Otherwise, I concur only in the judgment.

Our opinion in *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967), authored by JUSTICE BRENNAN, articulated a three-factor formula for determining the retroactivity of decisions changing the constitutional rules of criminal procedure. The formula, which applied whether a case was on direct review or arose in collateral proceedings, involved consideration of the purpose of the new rule, the extent of reliance on the old rule, and the effect on the administration of justice of retroactive application of the new rule. In a series of cases, however, the Court has departed from *Stovall* and has held that decisions changing the governing rules in criminal cases will be applied retroactively to all cases then pending on direct review, *e. g.*, *United States* v. *Johnson*, 457 U. S. 537 (1982); *Shea* v. *Louisiana*, 470 U. S. 51 (1985); *Griffith* v. *Kentucky*, 479 U. S. 314 (1987). I dissented in those cases, believing that *Stovall* was the sounder approach. Other Justices, including the CHIEF JUSTICE and JUSTICE O'CONNOR, joined my dissents in those cases. The CHIEF JUSTICE indicated in *Shea* and *Griffith*, and JUSTICE O'CONNOR has now concluded, that the *Stovall* formula should also be abandoned in cases where convictions have become final and the issue of retroactivity arises in collateral proceedings.

I regret the course the Court has taken to this point, but cases like *Johnson*, *Shea*, and *Griffith* have been decided, and I have insufficient reason to continue to object to them. In light of those decisions, the result reached in Parts IV and V of JUSTICE O'CONNOR's opinion is an acceptable application in collateral proceedings of the theories embraced by the Court in cases dealing with direct review, and I concur in that result. If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us; but because the Court's recent decisions dealing with direct review appear to have constitutional underpinnings, see *e. g.*, *Griffith* v. *Kentucky*, *supra*, at 322–323, correction of our error, if error there is, perhaps lies with us, not Congress.

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join Part I of JUSTICE STEVENS' opinion, *post* this page and 319–323, concurring in part and concurring in the judgment. So far as the petitioner's claim based upon *Swain* v. *Alabama*, 380 U. S. 202 (1965), is concerned, I concur in the judgment.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins as to Part I, concurring in part and concurring in the judgment.

I

For the reasons stated in Part III of JUSTICE BRENNAN's dissent, *post*, at 342, I am persuaded this petitioner has alleged a violation of the Sixth Amendment.[1] I also believe the Court should decide that question in his favor. I do not agree with JUSTICE O'CONNOR's assumption that a ruling in petitioner's favor on the merits of the Sixth Amendment issue would require that his conviction be set aside. See *ante*, at 300, 315.

When a criminal defendant claims that a procedural error tainted his conviction, an appellate court often decides whether error occurred before deciding whether that error requires reversal or should be classified as harmless. I would follow a parallel approach in cases raising novel questions of constitutional law on collateral review, first deter-

[1] Of course the Constitution does not require that every 12-person jury proportionally represent a "fair cross section" of the community. See *ante*, at 299. But as JUSTICE BRENNAN points out, *post*, at 341, and n. 8, petitioner does not claim such an entitlement. Petitioner does possess a right to have his petit jury selected by procedures that are "impartial." See U. S. Const., Amdt. 6 ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."). It is clear to me that a procedure that allows a prosecutor to exclude all black venirepersons, without any reason for the exclusions other than their race appearing in the record, does not comport with the Sixth Amendment's impartiality requirement.

mining whether the trial process violated any of the petitioner's constitutional rights and then deciding whether the petitioner is entitled to relief. If error occurred, factors relating to retroactivity—most importantly, the magnitude of unfairness—should be examined before granting the petitioner relief. Proceeding in reverse, a plurality of the Court today declares that a new rule should not apply retroactively without ever deciding whether there is such a rule.[2]

In general, I share Justice Harlan's views about retroactivity. See *Mackey* v. *United States*, 401 U. S. 667, 675–702 (1971) (opinion concurring in judgments in part and dissenting in part); *Desist* v. *United States*, 394 U. S. 244, 256–269 (1969) (dissenting opinion). Thus I joined the Court in holding that, as Justice Harlan had urged, new criminal procedural rules should be applied to all defendants whose convictions are not final when the rule is announced. *Griffith* v. *Kentucky*, 479 U. S. 314 (1987). I also agree with Justice Harlan that defendants seeking collateral review should not benefit from new rules unless those rules "fre[e] individuals from punishment for conduct that is constitutionally protected" or unless the original trial entailed elements of fundamental unfairness. *Mackey*, *supra*, at 693. Thus, although I question the propriety of making such an important change in the law without briefing or argument, cf. *Allen* v. *Hardy*,

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[2] The plurality states that retroactivity questions ought to be decided at the same time a new rule of criminal procedure is announced. See *ante*, at 300. I agree that this should be the approach in most instances. By declaring retroactivity to be the "threshold question," *ibid.*, however, the plurality inverts the proper order of adjudication. Among other things, until a rule is set forth, it would be extremely difficult to evaluate whether the rule is "new" at all. If it is not, of course, no retroactivity question arises. See, *e. g.*, *Yates* v. *Aiken*, 484 U. S. 211 (1988); *Lee* v. *Missouri*, 439 U. S. 461 (1979) *(per curiam)*; accord, *ante*, at 300, 307. I note too that in *Witherspoon* v. *Illinois*, 391 U. S. 510, 523, n. 22 (1968), which the plurality cites to support its simultaneous decision guideline, retroactivity was addressed only after establishment of the new constitutional rule.

478 U. S. 255, 261–262 (1986) (MARSHALL, J., dissenting), I am persuaded that the Court should adopt Justice Harlan's analysis of retroactivity for habeas corpus cases as well for cases still on direct review. See *ante*, at 305–310.

I do not agree, however, with the plurality's dicta proposing a "modification" of Justice Harlan's fundamental fairness exception. See *ante*, at 311–316. "[I]t has been the law, presumably for at least as long as anyone currently in jail has been incarcerated," Justice Harlan wrote, "that procedures utilized to convict them must have been fundamentally fair, that is, in accordance with the command of the Fourteenth Amendment that '[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.'" *Mackey*, 401 U. S., at 689. He continued:

> "[T]he writ ought always to lie for claims of nonobservance of those procedures that, as so aptly described by Mr. Justice Cardozo in *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937), are 'implicit in the concept of ordered liberty.' Typically, it should be the case that any conviction free from federal constitutional error at the time it became final, will be found, upon reflection, to have been fundamentally fair and conducted under those procedures essential to the substance of a full hearing. However, in some situations it might be that time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Id.*, at 693.

In embracing Justice Cardozo's notion that errors "violat[ing] those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" *Palko* v. *Connecticut*, 302 U. S. 319, 328 (1937) (quoting *Hebert*

v. *Louisiana*, 272 U. S. 312, 316 (1926)), must be rectified, Justice Harlan expressly rejected a previous statement linking the fundamental fairness exception to factual innocence. *Mackey*, *supra*, at 694; see *Desist*, *supra*, at 262.

The plurality wrongly resuscitates Justice Harlan's early view, indicating that the only procedural errors deserving correction on collateral review are those that undermine "an accurate determination of innocence or guilt . . . ." See *ante*, at 313. I cannot agree that it is "unnecessarily anachronistic," *ante*, at 312, to issue a writ of habeas corpus to a petitioner convicted in a manner that violates fundamental principles of liberty. Furthermore, a touchstone of factual innocence would provide little guidance in certain important types of cases, such as those challenging the constitutionality of capital sentencing hearings.[3] Even when assessing er-

[3] A major reason that Justice Harlan espoused limited retroactivity in collateral proceedings was the interest in making convictions final, an interest that is wholly inapplicable to the capital sentencing context. As he explained:

"It is, I believe, a matter of fundamental import that there be a visible end to the litigable aspect of the criminal process. Finality in the criminal law is an end which must always be kept in plain view. See, *e. g.*, *Fay* v. *Noia*, 372 U. S.[391,] 445 [(1963)] (Clark, J., dissenting); *Spencer* v. *Texas*, 385 U. S. 554, 583 (1967) (Warren, C. J., concurring and dissenting). See also Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146–151 (1970). As I have stated before, 'Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.' *Sanders* v. *United States*, 373 U. S.[1,] 24–25 [(1963)] (Harlan, J., dissenting). At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a

rors at the guilt phase of a trial, factual innocence is too capricious a factor by which to determine if a procedural change is sufficiently *"bedrock"* or "watershed" to justify application of the fundamental fairness exception. See *ante*, at 311. In contrast, given our century-old proclamation that the Constitution does not allow exclusion of jurors because of race, *Strauder* v. *West Virginia*, 100 U. S. 303 (1880), a rule promoting selection of juries free from racial bias clearly implicates concerns of fundamental fairness.

As a matter of first impression, therefore, I would conclude that a guilty verdict delivered by a jury whose impartiality might have been eroded by racial prejudice is fundamentally unfair. Constraining that conclusion is the Court's holding in *Allen* v. *Hardy*, 478 U. S. 255 (1986) *(per curiam)*—an opinion I did not join—that *Batson* v. *Kentucky*, 476 U. S. 79 (1986), cannot be applied retroactively to permit collateral review of convictions that became final before it was decided. It is true that the *Batson* decision rested on the Equal Protection Clause of the Fourteenth Amendment and that this case raises a Sixth Amendment issue. In both cases, however, petitioners pressed their objections to the jury selection on both grounds. See *ante*, at 293; *Batson* v. *Kentucky*, *supra*, at 83. Both cases concern the constitutionality of allowing the use of peremptories to yield a jury that may be biased against a defendant on account of race. Identical practical ramifications will ensue from our holdings in both cases. Thus if there is no fundamental unfairness in denying retroactive relief to a petitioner denied his Fourteenth Amendment right to a fairly chosen jury, as the Court

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man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved." *Mackey* v. *United States*, 401 U. S. 667, 690–691 (1971) (opinion concurring in judgments in part and dissenting in part).

held in *Allen*,[4] there cannot be fundamental unfairness in denying this petitioner relief for the violation of his Sixth Amendment right to an impartial jury. I therefore agree that the judgment of the Court of Appeals must be affirmed.[5]

II

I do not, however, agree with the Court's disposition of the contention that the prosecutor violated the Equal Protection Clause by using peremptory challenges to exclude black persons from petitioner's jury. *Ante*, at 297–299. The basis for this claim is *Swain* v. *Alabama*, 380 U. S. 202 (1965), which reaffirmed that equal protection requires that jurors "'be selected as individuals, on the basis of individual qualifications, and not as members of a race.'" *Id.*, at 204 (quoting *Cassell* v. *Texas*, 339 U. S. 282, 286 (1950) (plurality opinion)). Discussing how a defendant might prove purposeful racial discrimination in jury selection, the Court stated:

> "In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were re-

[4] Cf. *Rose* v. *Lundy*, 455 U. S. 509, 544, n. 8 (1982) (STEVENS, J., dissenting) ("In ruling that a constitutional principle is not to be applied retroactively, the Court implicitly suggests that the right is not necessary to ensure the integrity of the underlying judgment; the Court certainly would not allow claims of such magnitude to remain unremedied").

[5] In addition, because I agree that the opinions in *McCray* v. *New York*, 461 U. S. 961 (1983), do not afford petitioner a ground for retroactive application of *Batson* v. *Kentucky*, 476 U. S. 79 (1986), I join Part II of this Court's opinion.

> moved from the jury or that they were removed because they were Negroes." 380 U. S., at 222.

The Court of Appeals rejected petitioner's claim because he "did not specifically raise [it] in the state court," 820 F. 2d 832, 834, n. 6 (CA7 1987) (en banc), and because he had not rebutted the *Swain* presumption by "show[ing] the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." 380 U. S., at 227. It thus ignored the import of petitioner's claim; *i. e.*, that a prosecutor who volunteers explanations for using peremptories erases the *Swain* presumption, so that the trial judge should examine whether the race-neutral explanations are genuine or pretextual.

Petitioner's trial counsel twice moved for a mistrial on the ground that the prosecutor impermissibly had exercised peremptory challenges to effect an all-white jury. The prosecutor responded that "numerous individuals that were excused were of very young years. There was an attempt, your Honor, to have a balance of an equal number of men and women . . . ." App. 3.[6] With little comment the trial court

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[6] The colloquy surrounding the second motion for mistrial, made after the jury had been selected, was as follows:

"MR. MOTTA [defense counsel]: As the Court is aware State exercised 10 peremptory challenges and each challenge excused a black person. I feel that my client is entitled to a jury of his peers, your Honor. I feel that he is being denied this. I would ask the Court for a mistrial.

"MR. ANGAROLA [prosecutor]: We exercised more than 10 challenges. In fact we exercised 11 challenges and didn't just excuse black individuals. Counsel is incorrect when he stat[e]s that.

"In fact, your Honor, one of the challenges, peremptory challenges exercised was against a white woman. In addition, your Honor, numerous individuals that were excused were of very young years. There was an attempt, your Honor, to have a balance of an equal number of men and women as the jury is now comprised there are seven men and five women sitting on the jury.

"We feel that counsel's motion is totally improper.

"MR. MOTTA: If I may respond to that briefly, your Honor, State exercised 10 peremptory challenges, all of 10 black people were excused; that

denied the mistrial motions. There is substantial force to petitioner's argument that the volunteered explanations made this more than the "ordinary exercise of challenges" to which *Swain*'s systematic proof requirement applies, *Swain*, *supra*, at 227, and that the trial court erred by failing to scrutinize the prosecutor's excuses.[7]

I note, however, that petitioner never presented his *Swain* claim to the state courts before including it in the instant federal habeas petition. In *Rose* v. *Lundy*, 455 U. S. 509 (1982), the Court announced that a habeas petition containing exhausted and unexhausted claims must be dismissed. Literal adherence to that pronouncement would require that this case be remanded to the District Court with instructions to dismiss the petition without consideration of the exhausted Sixth Amendment claim. The Court avoids this result by

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their one peremptory challenge for an alternate juror excused, I believe, a white woman. I think the record will reflect that ages and background of the individuals that were excused. They were all to sit on the regular jury. I am not talking about the alternate, the one white alternate that was excused by the State.

"MR. ANGAROLA: As your Honor previously pointed out, counsel himself excluded a black, Mrs. McCleary, your Honor, who was a black individual who was accepted by the People, and he excused her.

"THE COURT: Counsel, I feel that it would appear that the jury appears to be a fair jury. I will deny your motion." App. 3–4.

[7] Recently the Court of Appeals for the Eighth Circuit employed this theory to hold that a prosecutor's volunteering of explanations for his use of peremptory challenges overcame the *Swain* presumption. *Garrett* v. *Morris*, 815 F. 2d 509, cert. denied *sub nom. Jones* v. *Garrett*, 484 U. S. 898 (1987). Upon examination the court concluded that the explanations were pretexts for purposeful discrimination; therefore, it remanded for retrial or release of the petitioner on a writ of habeas corpus. 815 F. 2d, at 514. See also *Weathersby* v. *Morris*, 708 F. 2d 1493 (CA9 1983), cert. denied, 464 U. S. 1046 (1984). Cf. *Batson*, *supra*, at 101, n. (WHITE, J., concurring) ("Nor would it have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant").

holding that "petitioner has forfeited review of the claim in the Illinois courts" and thus exhausted his state remedies. *Ante*, at 297. It is true that "a federal habeas court need not require that a federal claim be presented to a state court if it is clear that the state court would hold the claim procedurally barred." *Harris* v. *Reed*, *ante*, at 263, n. 9 (citing *Castille* v. *Peoples*, *post*, at 351; *ante*, at 298). I am by no means convinced, however, that the Illinois courts would not conclude that petitioner's *Swain* claim falls within their fundamental fairness exception to their ban on collateral review of claims that are otherwise waived. Thus, in the absence of any "plain statement" by the Illinois courts, cf. *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983), we should let the Illinois judiciary decide whether there is a procedural default that forecloses review of that claim. Until those courts have spoken, I would treat petitioner's *Swain* claim as an unexhausted claim that is not ripe for review on federal habeas.

Because "the exhaustion rule requiring dismissal of mixed petitions . . . is not jurisdictional," *Strickland* v. *Washington*, 466 U. S. 668, 684 (1984), and because petitioner's Sixth Amendment claim is foreclosed by the decision in *Allen*, I concur in the Court's judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today a plurality of this Court, without benefit of briefing and oral argument, adopts a novel threshold test for federal review of state criminal convictions on habeas corpus. It does so without regard for—indeed, without even mentioning—our contrary decisions over the past 35 years delineating the broad scope of habeas relief. The plurality further appears oblivious to the importance we have consistently accorded the principle of *stare decisis* in nonconstitutional cases. Out of an exaggerated concern for treating similarly situated habeas petitioners the same, the plurality would for the first time preclude the federal courts from considering on collateral review a vast range of important constitutional

challenges; where those challenges have merit, it would bar the vindication of personal constitutional rights and deny society a check against further violations until the same claim is presented on direct review. In my view, the plurality's "blind adherence to the principle of treating like cases alike" amounts to "letting the tail wag the dog" when it stymies the resolution of substantial and unheralded constitutional questions. *Griffith* v. *Kentucky*, 479 U. S. 314, 332 (1987) (WHITE, J., dissenting). Because I cannot acquiesce in this unprecedented curtailment of the reach of the Great Writ, particularly in the absence of any discussion of these momentous changes by the parties or the lower courts, I dissent.

I

The federal habeas corpus statute provides that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2254.[1] For well over a century, we have read this statute and its forbears to authorize federal courts to grant writs of habeas corpus whenever a person's liberty is unconstitutionally restrained. Shortly after the Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385, empowered federal courts to issue writs of habeas corpus to state authorities, we noted: "This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties,

[1] Prisoners sentenced by a *federal* court may seek to have their sentences vacated, corrected, or set aside "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U. S. C. § 2255. The plurality does not address the question whether the rule it announces today extends to claims brought by federal, as well as state, prisoners.

or laws. It is impossible to widen this jurisdiction." *Ex parte McCardle*, 6 Wall. 318, 325–326 (1868). See also *Fay* v. *Noia*, 372 U. S. 391, 426 (1963) ("Congress in 1867 sought to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the federal courts to their constitutional maximum"). Nothing has happened since to persuade us to alter that judgment. Our thorough survey in *Fay* v. *Noia* of the history of habeas corpus at common law and in its federal statutory embodiment led us to conclude that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review." *Id.*, at 424. In *Noia* we therefore held that federal courts have the power to inquire into any constitutional defect in a state criminal trial, provided that the petitioner remains "in custody" by virtue of the judgment rendered at that trial. Our subsequent rulings have not departed from that teaching in cases where the presentation of a petitioner's claim on collateral review is not barred by a procedural default. See, *e. g.*, *Rose* v. *Mitchell*, 443 U. S. 545, 550–565 (1979); *Jackson* v. *Virginia*, 443 U. S. 307, 320–324 (1979).

In particular, our decisions have made plain that the federal courts may collaterally review claims such as Teague's once state remedies have been exhausted. In *Brown* v. *Allen*, 344 U. S. 443 (1953), for example, we held that state prisoners alleging discrimination in the selection of members of the grand jury that indicted them and the petit jury that tried them were entitled to reconsideration of those allegations in federal court. "Discriminations against a race by barring or limiting citizens of that race from participation in jury service," we noted, "are odious to our thought and our Constitution. This has long been accepted as the law." *Id.*, at 470 (citations omitted). See also *Vasquez* v. *Hillery*, 474 U. S. 254 (1986); *Rose* v. *Mitchell*, *supra*.

Our precedents thus supply no support for the plurality's curtailment of habeas relief.[2] Just as it was "a fortuity that we overruled *Swain* v. *Alabama*, 380 U. S. 202 (1965) [which set forth an unduly strict standard for proving that a prosecutor's use of peremptory challenges was racially discriminatory in violation of the Equal Protection Clause], in a case that came to us on direct review" when "[w]e could as easily

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[2] Until today, this Court has imposed but one substantive limitation on the cognizability of habeas claims. In *Stone* v. *Powell*, 428 U. S. 465 (1976), the Court held that where a State has provided a defendant with an opportunity for full and fair litigation of a claim that evidence used against him was obtained through an unlawful search or seizure in violation of the Fourth Amendment, he may not relitigate that claim on federal habeas. The Court noted, however, that "Fourth Amendment violations are different in kind from denials of Fifth or Sixth Amendment rights," *id.*, at 479, and it expressly stated that its decision was "*not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally," in substantial part because "the exclusionary rule is a judicially created remedy rather than a personal constitutional right." *Id.*, at 495, n. 37. None of the Court's reasoning in *Stone* v. *Powell* supports the plurality's present decision not to adjudicate Teague's claim, because Teague is attempting to vindicate what he alleges is a fundamental personal right, rather than trying to invoke a prophylactic rule devised by this Court to deter violations of personal constitutional rights by law enforcement officials. In cases of this kind, our reluctance to allow federal courts to interfere with state criminal processes has never been deemed paramount. See *Vasquez* v. *Hillery*, 474 U. S. 254, 262 (1986); *Rose* v. *Mitchell*, 443 U. S. 545, 584, n. 6 (1979) (Powell, J., concurring in judgment).

Our ruling in *Rose* v. *Mitchell*, *supra*, confirms this conclusion. We there rejected the argument that our holding in *Stone* v. *Powell* should be extended to preclude federal habeas review of claims of racial discrimination in the selection of members of a state grand jury, notwithstanding the fact that the selection of petit jurors was free from constitutional infirmity and that guilt was established beyond a reasonable doubt at a trial devoid of constitutional error. Teague's challenge to the composition of the petit jury is perforce on even firmer ground. See also *Kimmelman* v. *Morrison*, 477 U. S. 365 (1986) (counsel's failure to litigate competently petitioner's Fourth Amendment claim cognizable on habeas); *Jackson* v. *Virginia*, 443 U. S. 307, 320–324 (1979) (sufficiency of the evidence claims may be brought on habeas).

have granted certiorari and decided the matter in a case on collateral review," *Griffith* v. *Kentucky*, 479 U. S., at 332 (WHITE, J., dissenting), so too there is no reason why we cannot decide Teague's almost identical claim under the Sixth Amendment on collateral review rather than in a case on direct review. Because there is no basis for extending the Court's rationale in *Stone* v. *Powell*, 428 U. S. 465 (1976), to preclude review of Teague's challenge to the composition of the jury that convicted him, and because I perceive no other ground consistent with our precedents for limiting the cognizability of constitutional claims on federal habeas corpus, I would reach the merits of Teague's Sixth Amendment argument and hold in his favor.

II

Unfortunately, the plurality turns its back on established case law and would erect a formidable new barrier to relief. Any time a federal habeas petitioner's claim, if successful, would result in the announcement of a new rule of law, the plurality says, it may only be adjudicated if that rule would "plac[e] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" *ante*, at 307, quoting *Mackey* v. *United States*, 401 U. S. 667, 692 (1971) (Harlan, J., concurring in judgments in part and dissenting in part), or if it would mandate "new procedures without which the likelihood of an accurate conviction is seriously diminished." *Ante*, at 313.

A

Astonishingly, the plurality adopts this novel precondition to habeas review without benefit of oral argument on the question and with no more guidance from the litigants than a three-page discussion in an *amicus* brief. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* 22–24.[3]

[3] As the plurality points out, *ante*, at 300, our decision in *Allen* v. *Hardy*, 478 U. S. 255 (1986) *(per curiam)*, addressed the retroactive application of our holding in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), even

Although the plurality's approach builds upon two opinions written by Justice Harlan some years ago, see *Mackey* v. *United States*, *supra*, at 675 (opinion concurring in judgments in part and dissenting in part); *Desist* v. *United States*, 394 U. S. 244, 256 (1969) (dissenting opinion), it declines fully to embrace his views. No briefing or argument at all was devoted to the points at which the plurality departs from his proposals. It is indeed ironic that in endorsing the bulk of Justice Harlan's approach to the provision of federal habeas relief, the Court ignores his reminder that our "obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue." *Mapp* v. *Ohio*, 367 U. S. 643, 677 (1961) (dissenting opinion). Before breaking so sharply with precedent, the plurality would have done well, I think, to recall what we said in *Ladner* v. *United States*, 358 U. S. 169, 173 (1958): "The question of the scope of collateral attack upon criminal sentences is an important and complex one . . . . We think that we should have the benefit of a full argument before dealing with the question."

B

Equally disturbing, in my view, is the plurality's infidelity to the doctrine of *stare decisis*. That doctrine "demands respect in a society governed by the rule of law," *Akron* v.

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though the petition for certiorari in that case did not discuss that issue. Our decision in *Allen*, however, applied settled retroactivity doctrine; unlike the plurality's opinion today, it did not announce a sharp break with past practice. And although the course we followed in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), was urged on us by *amicus* rather than by the parties themselves, incorporation of the protections of the Bill of Rights through the Fourteenth Amendment was by no means a novel step at that time, and the relevant issues were familiar from our prior cases. Nor does the fact that the parties here debated the extent to which *Batson* should be applied retroactively diminish the startling abruptness of the plurality's action, for the adoption of a version of Justice Harlan's approach to retroactivity to bar habeas review of most claims that would result in new rules of law if they prevailed was *not even mentioned* by the parties.

Akron Center for Reproductive Health, Inc., 462 U. S. 416, 419–420 (1983), because it enhances the efficiency of judicial decisionmaking, allowing judges to rely on settled law without having to reconsider the wisdom of prior decisions in every case they confront, and because it fosters predictability in the law, permitting litigants and potential litigants to act in the knowledge that precedent will not be overturned lightly and ensuring that they will not be treated unfairly as a result of frequent or unanticipated changes in the law. We have therefore routinely imposed on those asking us to overrule established lines of cases "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez* v. *Hillery*, 474 U. S., at 266.

In this case, as when we considered the reviewability of grand jury discrimination on habeas corpus, "we have been offered no reason to believe that any such metamorphosis has rendered the Court's long commitment to a rule of reversal outdated, ill-founded, unworkable, or otherwise legitimately vulnerable to serious reconsideration." *Vasquez* v. *Hillery*, *supra*, at 266. None of the reasons we have hitherto deemed necessary for departing from the doctrine of *stare decisis* are present. Our interpretations of the reach of federal habeas corpus have not proceeded from inadequate briefing or argumentation, nor have they taken the form of assertion unaccompanied by detailed justification. See, *e. g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 766 (1984). No new facts or arguments have come to light suggesting that our reading of the federal habeas statute or our divination of congressional intent was plainly mistaken. See, *e. g.*, *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). In addition, Congress has done nothing to shrink the set of claims cognizable on habeas since it passed the Habeas Corpus Act of 1867, despite our consistent interpretation of the federal habeas statute to permit adjudication of

cases like Teague's. Finally, the rationale for our decisions has not been undermined by subsequent congressional or judicial action. See, *e. g.*, *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U. S. 484, 497–499 (1973). None of the exceptions to the doctrine of *stare decisis* we have recognized apply. I therefore remain mystified at where the plurality finds warrant to upset, *sua sponte*, our time-honored precedents.

C

The plurality does not so much as mention *stare decisis*. Indeed, from the plurality's exposition of its new rule, one might infer that its novel fabrication will work no great change in the availability of federal collateral review of state convictions. Nothing could be further from the truth. Although the plurality declines to "define the spectrum of what may or may not constitute a new rule for retroactivity purposes," it does say that generally "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Ante*, at 301. Otherwise phrased, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Ibid.* This account is extremely broad.[4] Few decisions on appeal or collateral review are *"dictated"* by what came before. Most such cases involve a question of law that is at least debatable, permitting a rational judge to resolve the case in more than one way. Virtually no case that prompts a dissent on the relevant legal point, for example, could be said to be *"dictated"* by prior decisions. By the plurality's test, therefore,

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[4] Compare Justice Stewart's much more restrained approach in *Milton* v. *Wainwright*, 407 U. S. 371 (1972): "An issue of the 'retroactivity' of a decision of this Court is not even presented unless the decision in question marks a sharp break in the web of the law. The issue is presented only when the decision overrules clear past precedent, or disrupts a practice long accepted and widely relied upon." *Id.*, at 381, n. 2 (dissenting opinion) (citations omitted).

a great many cases could only be heard on habeas if the rule urged by the petitioner fell within one of the two exceptions the plurality has sketched. Those exceptions, however, are narrow. Rules that place "'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" *ante*, at 307, quoting *Mackey* v. *United States*, 401 U. S., at 692 (Harlan, J., concurring in judgments in part and dissenting in part), are rare. And rules that would require "new procedures without which the likelihood of an accurate conviction is seriously diminished," *ante*, at 313, are not appreciably more common. The plurality admits, in fact, that it "believe[s] it unlikely that many such components of basic due process have yet to emerge." *Ibid.* The plurality's approach today can thus be expected to contract substantially the Great Writ's sweep.

Its impact is perhaps best illustrated by noting the abundance and variety of habeas cases we have decided in recent years that could never have been adjudicated had the plurality's new rule been in effect. Although "history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt," *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 257 (1973) (Powell, J., concurring), the plurality's decision to ignore history and to link the availability of relief to guilt or innocence when the outcome of a case is not "*dictated*" by precedent would apparently prevent a great many Fifth, Sixth, and Fourteenth Amendment cases from being brought on federal habeas.

For example, in *Nix* v. *Whiteside*, 475 U. S. 157 (1986), the Court ruled that a defendant's right to counsel under the Sixth Amendment is not violated when a defense attorney refuses to cooperate with him in presenting perjured testimony at trial. Clearly, the *opposite* result sought by the petitioner could not have been dictated by prior cases, nor would the introduction of perjured testimony have improved the accuracy of factfinding at trial. The claim presented on habeas was therefore novel yet well outside the plurality's

exceptions. Were the claim raised tomorrow on federal collateral review, a court could not reach the merits, as did we. The same is true of numerous right-to-counsel and representation claims we have decided where the wrong alleged by the habeas petitioner was unlikely to have produced an erroneous conviction. See, *e. g.*, *Moran* v. *Burbine*, 475 U. S. 412 (1986) (failure of police to inform defendant that attorney retained for him by somebody else sought to reach him does not violate Sixth Amendment); *McKaskle* v. *Wiggins*, 465 U. S. 168 (1984) (*pro se* defendant's right to conduct own defense not violated by unsolicited participation of standby counsel); *Jones* v. *Barnes*, 463 U. S. 745 (1983) (appellate defense counsel does not have Sixth Amendment duty to raise every nonfrivolous issue requested by defendant); *Morris* v. *Slappy*, 461 U. S. 1 (1983) (state court's denial of continuance until public defender initially assigned to represent defendant became available does not violate Sixth Amendment); *Wainwright* v. *Torna*, 455 U. S. 586 (1982) *(per curiam)* (no deprivation of right to counsel when defense attorney failed to make timely filing of application for certiorari in state court); *Moore* v. *Illinois*, 434 U. S. 220 (1977) (Sixth Amendment violated by corporeal identification conducted after initiation of adversary criminal proceedings in the absence of counsel); *Ross* v. *Moffitt*, 417 U. S. 600 (1974) (States need not provide indigent defendants with counsel on discretionary appeals).

Likewise, because "the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth," *Tehan* v. *Shott*, 382 U. S. 406, 416 (1966), claims that a petitioner's right to remain silent was violated would, if not dictated by earlier decisions, ordinarily fail to qualify under the plurality's second exception. In *Estelle* v. *Smith*, 451 U. S. 454 (1981), for example, we held that a psychiatrist who examined the defendant before trial without warning him that what he said could be used against him in a capital sentencing proceeding could not testify against him at such a proceeding. Under the plurality's newly fashioned

rule, however, we could not have decided that case on the merits. The result can hardly be said to have been compelled by existing case law, see *id.*, at 475 (REHNQUIST, J., concurring in judgment), and the exclusion of such testimony at sentencing cannot have influenced the jury's determination of the defendant's guilt or enhanced the likely accuracy of his sentence.[5] Nor is *Estelle* v. *Smith* unique in that respect. See, *e. g.*, *Greer* v. *Miller*, 483 U. S. 756 (1987) (single question by prosecutor during cross-examination concerning defendant's postarrest silence does not violate Fifth Amendment); *Moran* v. *Burbine*, *supra* (failure of police to inform defendant of efforts of attorney to reach him does not vitiate waiver of *Miranda* rights); *Fletcher* v. *Weir*, 455 U. S. 603 (1982) *(per curiam)* (prosecutor's use of defendant's postarrest silence for impeachment purposes does not constitute due process violation when defendant did not receive *Miranda* warnings during the period of his postarrest silence); *Jenkins* v. *Anderson*, 447 U. S. 231 (1980) (Fifth Amendment not violated by prosecutor's use of prearrest silence to impeach defendant's credibility).

Habeas claims under the Double Jeopardy Clause will also be barred under the plurality's approach if the rules they seek to establish would "brea[k] new ground or impos[e] a new obligation on the States or the Federal Government," *ante*, at 301, because they bear no relation to the petitioner's

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[5] In "limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished," *ante*, at 313, the plurality presumably intends the exception to cover claims that involve the accuracy of the defendant's sentence as well as the accuracy of a court's determination of his guilt. See *Smith* v. *Murray*, 477 U. S. 527, 538 (1986) (no "fundamental miscarriage of justice" where introduction of testimony at sentencing phase of capital case "neither precluded the development of true facts nor resulted in the admission of false ones"). Thus, the plurality's new rule apparently would not prevent capital defendants, for example, from raising Eighth Amendment, due process, and equal protection challenges to capital sentencing procedures on habeas corpus.

guilt or innocence. See, *e. g.*, *Crist* v. *Bretz*, 437 U. S. 28 (1978) (state law providing that jeopardy does not attach until first juror is sworn is unconstitutional); *Chaffin* v. *Stynchcombe*, 412 U. S. 17 (1973) (rendition of higher sentence by jury upon retrial does not violate Double Jeopardy Clause). So, too, will miscellaneous due process and Sixth Amendment claims that relate only tangentially to a defendant's guilt or innocence. See, *e. g.*, *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978) (no due process violation when prosecutor carries out threat to reindict on stiffer charge); *Barker* v. *Wingo*, 407 U. S. 514 (1972) (5-year delay does not violate right to speedy trial). And of course cases closely related to Teague's, such as *Lockhart* v. *McCree*, 476 U. S. 162 (1986), where we held that the removal for cause of so-called "*Witherspoon*-excludables" does not violate the Sixth Amendment's fair cross section requirement, would be beyond the purview of this Court when they arrived on habeas.

D

These are massive changes, unsupported by precedent.[6] They also lack a reasonable foundation. By exaggerating the importance of treating like cases alike and granting relief to all identically positioned habeas petitioners or none, "the Court acts as if it has no choice but to follow a mechanical notion of fairness without pausing to consider 'sound principles

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[6]The plurality's claim that "our cases have moved in the direction of reaffirming the relevance of the likely accuracy of convictions in determining the available scope of habeas review," *ante*, at 313, has little force. Two of the cases it cites—*Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (1986) (plurality opinion), and *Murray* v. *Carrier*, 477 U. S. 478 (1986)—discuss the conditions under which a habeas petitioner may obtain review even though his claim would otherwise be procedurally barred. They do not hold that a petitioner's likely guilt or innocence bears on the cognizability of habeas claims in the absence of procedural default. And the Court has limited *Stone* v. *Powell*, 428 U. S. 465 (1976), as noted above, see *supra*, at 328–330, and n. 2, to Fourth Amendment exclusionary rule claims, passing up several opportunities to extend it.

of decisionmaking.'" *Griffith* v. *Kentucky*, 479 U. S., at 332–333 (WHITE, J., dissenting), quoting *Stovall* v. *Denno*, 388 U. S. 293, 301 (1967). Certainly it is desirable, in the interest of fairness, to accord the same treatment to all habeas petitioners with the same claims. Given a choice between deciding an issue on direct or collateral review that might result in a new rule of law that would not warrant retroactive application to persons on collateral review other than the petitioner who brought the claim, we should ordinarily grant certiorari and decide the question on direct review. Following our decision in *Griffith* v. *Kentucky*, *supra*, a new rule would apply equally to all persons whose convictions had not become final before the rule was announced, whereas habeas petitioners other than the one whose case we decided might not benefit from such a rule if we adopted it on collateral review. Taking cases on direct review ahead of those on habeas is especially attractive because the retrial of habeas petitioners usually places a heavier burden on the States than the retrial of persons on direct review. Other things being equal, our concern for fairness and finality ought to therefore lead us to render our decision in a case that comes to us on direct review.

Other things are not always equal, however. Sometimes a claim which, if successful, would create a new rule not appropriate for retroactive application on collateral review is better presented by a habeas case than by one on direct review. In fact, sometimes the claim is *only* presented on collateral review. In that case, while we could forgo deciding the issue in the hope that it would eventually be presented squarely on direct review, that hope might be misplaced, and even if it were in time fulfilled, the opportunity to check constitutional violations and to further the evolution of our thinking in some area of the law would in the meanwhile have been lost. In addition, by preserving our right and that of the lower federal courts to hear such claims on collateral review, we would not discourage their litigation on federal habeas corpus and

thus not deprive ourselves and society of the benefit of decisions by the lower federal courts when we must resolve these issues ourselves.

The plurality appears oblivious to these advantages of our settled approach to collateral review. Instead, it would deny itself these benefits because adherence to precedent would occasionally result in one habeas petitioner's obtaining redress while another petitioner with an identical claim could not qualify for relief.[7] In my view, the uniform treatment of habeas petitioners is not worth the price the plurality is willing to pay. Permitting the federal courts to decide novel habeas claims not substantially related to guilt or innocence has profited our society immensely. Congress has not seen fit to withdraw those benefits by amending the statute that provides for them. And although a favorable decision for a petitioner might not extend to another prisoner whose identical claim has become final, it is at least arguably better that the wrong done to one person be righted than that none of the injuries inflicted on those whose convictions have become final be redressed, despite the resulting inequality in treatment. I therefore adhere to what we said in *Stovall* v. *Denno*, *supra*, where we held that the rules we laid down in *United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v.

[7] The plurality's complaint that prior retroactivity decisions have sometimes led to more than one habeas petitioner's reaping the benefit of a new rule while most habeas petitioners obtained no relief because of "our failure to treat retroactivity as a threshold question," *ante*, at 305, is misguided. The disparity resulting from our deciding three years later, in *Solem* v. *Stumes*, 465 U. S. 638 (1984), not to apply retroactively the rule of *Edwards* v. *Arizona*, 451 U. S. 477, 484–487 (1981), should not be ascribed to our failure to make retroactivity a threshold question, but rather to our failure to decide the retroactivity question *at the same time* that we decided the merits issue. If both decisions are made contemporaneously, see, *e. g.*, *Witherspoon* v. *Illinois*, 391 U. S. 510, 523, n. 22 (1968); *Stovall* v. *Denno*, 388 U. S. 293 (1967), then only one exception need be made to the rule of equal treatment. The plurality may find even this slight inequality unacceptable, but the magnitude of the disparity is not, and need not be, as large as its example suggests.

California, 388 U. S. 263 (1967), should not be applied retroactively:

> "We recognize that Wade and Gilbert are, therefore, the only victims of pretrial confrontations in the absence of their counsel to have the benefit of the rules established in their cases. That they must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum. Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." *Id.*, at 301 (footnotes omitted).

I see no reason to abandon these views. Perfectly even-handed treatment of habeas petitioners can by no means justify the plurality's *sua sponte* renunciation of the ample benefits of adjudicating novel constitutional claims on habeas corpus that do not bear substantially on guilt or innocence.

III

Even if one accepts the plurality's account of the appropriate limits to habeas relief, its conclusion that Teague's claim may not be heard is dubious. The plurality seeks to give its decision a less startling aspect than it wears by repeatedly mischaracterizing Teague's Sixth Amendment claim. As the plurality would have it, Teague contends "'that petit juries actually chosen must mirror the community and reflect the

various distinctive groups in the population,'" *ante*, at 292, quoting *Taylor* v. *Louisiana*, 419 U. S. 522, 538 (1975), and that fairness in jury selection "'require[s] proportional representation of races upon a jury.'" *Ante*, at 301, quoting *Akins* v. *Texas*, 325 U. S. 398, 403 (1945). Teague, however, makes no such claim—which is presumably why the plurality quotes dicta from other cases rather than Teague's brief. He submits, rather, that "the Sixth Amendment guarantees the accused a jury selected in accordance with procedures that allow a *fair possibility* for the jury to reflect a cross section of the community." Brief for Petitioner 4 (emphasis added). Indeed, Teague specifically disavows the position attributed to him by the plurality: "The defendant is not entitled to a jury of any particular composition and no requirement exists that the petit jury mirror the distinctive groups in the population . . . ." *Ibid.* Teague's claim is simply that the Sixth Amendment's command that no distinctive groups be systematically excluded from jury pools, *Taylor* v. *Louisiana*, *supra*, or from venires drawn from them, *Duren* v. *Missouri*, 439 U. S. 357 (1979), applies with equal force to the selection of petit juries. He maintains that this firmly established principle prohibits the prosecution from using its peremptory challenges discriminatorily to prevent venirepersons from sitting on the jury merely because they belong to some racial, ethnic, or other group cognizable for Sixth Amendment purposes. Teague's claim is therefore closely akin to that which prevailed in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), where we held that the Equal Protection Clause prohibits the prosecution from using its peremptory challenges to exclude venirepersons from the jury solely because they share the defendant's race. The only potentially significant difference is that Teague's claim, if valid, would bar the prosecution from excluding venirepersons from the petit jury on account of their membership in some cognizable group even when the defendant is not himself a member of that group, whereas the Equal Protection Clause might not

provide a basis for relief unless the defendant himself belonged to the group whose members were improperly excluded.[8]

Once Teague's claim is characterized correctly, the plurality's assertions that on its new standard his claim is too novel to be recognized on habeas corpus, *ante*, at 301, and that the right he invokes is "a far cry from the kind of absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty,'" *ante*, at 314, are dubious. The requirement Teague asks us to impose does not go far beyond our mandates in *Taylor*, *Duren*, and *Batson;* indeed, it flows quite naturally from those decisions. The fact that the Sixth Amendment would permit a challenge by a defendant who did not belong to a cognizable group whose members were discriminatorily excluded from the jury does not alter that conclusion. As we said in *Rose* v. *Mitchell*, 443 U. S., at 555–556:

> "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice. Selection of members of a grand jury because they are of one race and not another destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process. The exclusion from grand jury service of Negroes, *or any group otherwise qualified to serve*, impairs the confidence of the public in the administration of justice. As this Court repeatedly has

[8] The plurality's persistent misreading of Teague's claim, *ante*, at 301–302, n. 1, is puzzling. To be sure, Teague does argue that the principles informing our decision in *Duren* v. *Missouri*, 439 U. S. 357 (1979), should be extended to the selection of the petit jury. But *Duren* does *not* require that every venire provide a microcosm of the community; it demands, instead, that no group be systematically excluded from venires unless a significant state interest would thereby be manifestly and primarily advanced. Lack of proportional representation of a cognizable group on a given petit jury, in Teague's view, helps to establish a prima facie Sixth Amendment violation; contrary to the plurality's suggestion, he does not contend that it is itself a *per se* violation.

> emphasized, such discrimination 'not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.' *Smith* v. *Texas*, 311 U. S. 128, 130 (1940) (footnote omitted). The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. 'The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.' *Ballard* v. *United States*, 329 U. S. 187, 195 (1946)." (Emphasis added.)

The plurality's assertion that Teague's claim fails to fit within Justice Harlan's second exception is also questionable. It bears noting that Justice Powell, long a staunch advocate of Justice Harlan's views on the scope of collateral review, leaned to the opposite opinion: "Whenever the fairness of the petit jury is brought into question doubts are raised as to the integrity of the process that found the prisoner guilty. Collateral relief therefore may be justified even though it entails some damages to our federal fabric." *Rose* v. *Mitchell*, *supra*, at 584, n. 6 (Powell, J., concurring) (citation omitted). Justice Jackson rightly observed:

> "It is obvious that discriminatory exclusion of Negroes from a trial jury does, or at least may, prejudice a Negro's right to a fair trial, and that a conviction so obtained should not stand. The trial jury hears the evidence of both sides and chooses what it will believe. In so deciding, it is influenced by imponderables—unconscious and conscious prejudices and preferences—and a thousand things we cannot detect or isolate in its verdict and whose influence we cannot weigh. A single juror's dissent is generally enough to prevent conviction. A trial jury on which one of the defendant's race has no chance to sit may not have the substance, and cannot

have the appearance, of impartiality, especially when the accused is a Negro and the alleged victim is not." *Cassell* v. *Texas*, 339 U. S. 282, 301–302 (1950) (dissenting opinion).

More recently, in *Vasquez* v. *Hillery*, 474 U. S., at 263, we expressly rejected the claim that "discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions." Because "intentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent," *id.*, at 262, we reaffirmed our decision in *Rose* v. *Mitchell*, *supra*, and held that a prisoner may seek relief on federal habeas for racial discrimination in the selection of the grand jury that indicted him and that such claims are not subject to harmless-error review. Compelling the State to indict and try him a second time, we said, despite the heavy burdens it imposes, "is not disproportionate to the evil that it seeks to deter." 474 U. S., at 262. The plurality's assertion that an allegation, like Teague's, of discrimination in the selection of the *petit* jury—with far graver impact on the fundamental fairness of a petitioner's trial than the discrimination we condemned in *Hillery*—is too tangentially connected with truth finding to warrant retroactive application on habeas corpus under its new approach therefore strains credibility.

IV

A majority of this Court's Members now share the view that cases on direct and collateral review should be handled differently for retroactivity purposes. See *Griffith* v. *Kentucky*, 479 U. S. 314 (1987); *Allen* v. *Hardy*, 478 U. S. 255 (1986) *(per curiam)*; *Williams* v. *United States*, 401 U. S. 646, 665 (1971) (opinion of MARSHALL, J.). In *Griffith*, the Court adopted Justice Harlan's proposal that a new rule be applied retroactively to all convictions not yet final when the rule was announced. If we had adhered to our precedents,

reached Teague's Sixth Amendment claim, and ruled in his favor, we would ultimately have had to decide whether we should continue to apply to habeas cases the three-factor approach outlined in *Stovall* v. *Denno*, 388 U. S., at 297, or whether we should embrace most of the other half of Justice Harlan's proposal and ordinarily refuse to apply new rules retroactively to cases on collateral review, except in the cases where they are announced.

In my view, that is not a question we should decide here. The better course would have been to grant certiorari in another case on collateral review raising the same issue and to resolve the question after full briefing and oral argument. JUSTICES BLACKMUN and STEVENS, *ante*, pp. 319–320, disagree. They concur in the Court's judgment on this point because they find further discussion unnecessary and because they believe that, although Teague's Sixth Amendment claim is meritorious, neither he nor other habeas petitioners may benefit from a favorable ruling. As I said in *Stovall* v. *Denno*, *supra*, at 301, according a petitioner relief when his claim prevails seems to me "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." But I share the view of JUSTICES BLACKMUN and STEVENS that the retroactivity question is one we need not address until Teague's claim has been found meritorious. Certainly it is not one the Court need decide *before* it considers the merits of Teague's claim because, as the plurality mistakenly contends, its resolution properly determines whether the merits should be reached. By repudiating our familiar approach without regard for the doctrine of *stare decisis*, the plurality would deprive us of the manifold advantages of deciding important constitutional questions when they come to us first or most cleanly on collateral review. I dissent.

CASTILLE, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, ET AL. *v.* PEOPLES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87–1602. Argued December 6, 1988–Decided February 22, 1989

Following the Pennsylvania Superior Court's affirmance, on direct appeal, of respondent's conviction of assault, robbery, and related crimes, he filed with the State Supreme Court successive unsuccessful petitions for allocatur, which, under state law, can be granted in the court's discretion "only when there are special and important reasons therefor." Respondent next filed a petition for federal habeas relief, raising various federal claims, some of which had been raised before the state courts only in one or the other of respondent's unsuccessful petitions for allocatur. The Federal District Court dismissed the petition for failure to exhaust state remedies. The Court of Appeals reversed and remanded. Without considering whether respondent could obtain state collateral review of his claims, the court held that their inclusion in the allocatur petitions sufficiently exhausted state remedies, since the State's highest court had thereby been given an opportunity to correct the alleged constitutional infirmities in respondent's conviction.

Held:

1. Title 28 U. S. C. § 2254(c) provides that a state-law judgment cannot be reviewed on federal habeas if the petitioner has a state-law right "to raise, by any available procedure, the question presented." This bar does not apply where the petitioner has already made a "fair presentation" of the particular claim to the state courts and has exhausted his direct appeals, since in such a situation it can reasonably be assumed that even if further state procedures are available, resort to them would be useless. That assumption is not justified, however, when the claim has been presented to the state courts for the first and only time in a procedural context in which its merits will not be considered unless "there are special and important reasons therefor." Raising the issue in that fashion is not "fair presentation" for purposes of the exception, and the bar of § 2254(c) continues to apply. The Court of Appeals therefore erred in resting its conclusion that respondent had exhausted his state remedies upon his presentation of the federal claims in the allocatur petitions. Pp. 349–351.

2. Whether the requisite exhaustion nonetheless exists because respondent's claims are now procedurally barred under Pennsylvania law should be decided by the Court of Appeals on remand. Pp. 351–352.

838 F. 2d 462, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

Gaele McLaughlin Barthold argued the cause for petitioners. With her on the briefs were *Elizabeth J. Chambers*, *William G. Chadwick, Jr.*, and *Ronald D. Castille, pro se.*

Robert E. Welsh, Jr., by appointment of the Court, 488 U. S. 810, argued the cause and filed a brief for respondent.

JUSTICE SCALIA delivered the opinion of the Court.

Following a jury trial in the Pennsylvania Court of Common Pleas, respondent Michael Peoples, who had been arrested for robbing a man and then setting him on fire, was convicted of "arson–endangering persons," aggravated assault, and robbery. The Pennsylvania Superior Court affirmed his conviction on direct appeal. *Commonwealth* v. *Peoples*, 319 Pa. Super. 621, 466 A. 2d 720 (1983). Respondent then filed a *pro se* petition for allocatur and appointment of counsel with the Pennsylvania Supreme Court. Under Pennsylvania law, such allocatur review "is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor." Pa. Rule App. Proc. 1114. The Pennsylvania Supreme Court granted the request for counsel without reaching the merits of the claims presented. Shortly thereafter, respondent, represented by appointed counsel, submitted a second petition for allocatur, raising some, but not all, of the claims he had raised *pro se*. On November 4, 1985, the Pennsylvania Supreme Court denied the second petition without opinion.

On July 28, 1986, respondent filed a petition for federal habeas relief in the United States District Court for the Eastern District of Pennsylvania, asserting: (1) that the prosecutor violated state law, and thereby due process, by cross-

examining him with regard to unrelated crimes; (2) that the Court of Common Pleas arbitrarily deprived him of his state-law right to a bench trial; (3) that the police used unreasonably suggestive identification procedures, which tainted the prosecution's in-court identifications; and (4) that defense counsel rendered ineffective assistance by failing to move to suppress various state's evidence obtained from an illegal arrest and search and seizure, and by failing to contest the introduction of evidence that respondent had acted in contempt of court by drastically altering his hairstyle just prior to a scheduled lineup.

After reviewing the procedural history of each claim, the District Court denied relief and dismissed the petition for failure to exhaust state remedies. Upon respondent's appeal, the United States Court of Appeals for the Third Circuit reversed and remanded for a hearing on the merits. *Peoples* v. *Fulcomer*, 838 F. 2d 462 (1987) (judgment order). The court found that claims (2) and (4) had first been raised in one or the other of the unsuccessful petitions for allocatur, but, without considering whether respondent could obtain review of these claims on state collateral review, held that such presentation sufficiently exhausted state remedies. Specifically, the Court of Appeals held that claims raised by respondent in either his *pro se* petition for allocatur or his later counseled petition for allocatur were exhausted by virtue of their inclusion in such petitions. It believed this result dictated by *Chaussard* v. *Fulcomer*, 816 F. 2d 925 (1987), an earlier Third Circuit opinion, which had read our case law to provide that "the exhaustion rule is satisfied when the state courts have had an 'opportunity to pass upon and correct' alleged violations of a prisoner's federal constitutional rights." *Id.*, at 928, quoting *Fay* v. *Noia*, 372 U. S. 391, 438 (1963). The *Chaussard* panel concluded that the discretionary nature of allocatur review by the Pennsylvania Supreme Court "does not affect the fact that [the] petition for allocatur . . . gave the highest Pennsylvania state court the opportunity to cor-

rect each alleged constitutional infirmity in [the] criminal convictio[n]." 816 F. 2d, at 928. We granted certiorari to consider whether the presentation of claims to a State's highest court on discretionary review, without more, satisfies the exhaustion requirements of 28 U. S. C. § 2254. 486 U. S. 1004 (1988).

Respondent's habeas petition should have been dismissed if state remedies had not been exhausted as to any of the federal claims. *Rose* v. *Lundy*, 455 U. S. 509 (1982). The exhaustion requirement, first enunciated in *Ex parte Royall*, 117 U. S. 241 (1886), is grounded in principles of comity and reflects a desire to "protect the state courts' role in the enforcement of federal law," *Rose* v. *Lundy*, *supra*, at 518. In addition, the requirement is based upon a pragmatic recognition that "federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review." 455 U. S., at 519. Codified since 1948 in 28 U. S. C. § 2254,* the exhaustion rule, while not a jurisdictional requirement, *Granberry* v. *Greer*, 481 U. S. 129 (1987), creates a "strong presumption in favor of requiring the prisoner to pursue his available state remedies." *Id.*, at 131; see also *Rose* v. *Lundy*, *supra*, at 515 ("[S]tate remedies must be exhausted except in unusual circumstances").

Today we address again what has become a familiar inquiry: "*To what extent* must the petitioner who seeks federal

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*Section 2254 in relevant part provides:

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

habeas exhaust state remedies before resorting to the federal court?" *Wainwright* v. *Sykes*, 433 U. S. 72, 78 (1977) (emphasis added). Title 28 U. S. C. § 2254(c) provides that a claim shall not be deemed exhausted so long as a petitioner "has the right under the law of the State to raise, by any available procedure, the question presented." Read narrowly, this language appears to preclude a finding of exhaustion if there exists any possibility of further state-court review. We have, however, expressly rejected such a construction, *Brown* v. *Allen*, 344 U. S. 443, 448–449, n. 3 (1953), holding instead that once the state courts have ruled upon a claim, it is not necessary for a petitioner "to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review." *Id.*, at 447. This interpretation reconciles § 2254(c) with § 2254(b), which provides that federal habeas review will lie where state corrective processes are "ineffective to protect the rights of the prisoner." It would be inconsistent with the latter provision, as well as with underlying principles of comity, to mandate recourse to state collateral review whose results have effectively been predetermined, or permanently to bar from federal habeas prisoners in States whose postconviction procedures are technically inexhaustible.

The Third Circuit's analysis in the present case derives from the manner in which we applied the holding of *Brown* in *Smith* v. *Digmon*, 434 U. S. 332 (1978) *(per curiam)*, where, on direct review, the Alabama Court of Criminal Appeals had failed to address explicitly a claim that had been properly presented. *Chaussard*, *supra*, at 928–929. Finding for the petitioner, we stated in *Digmon* that "[i]t is too obvious to merit extended discussion that whether the exhaustion requirement of 28 U. S. C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court, and, indeed, in this case, vigorously opposed in the State's brief." *Digmon*, *supra*, at

333. The reason that point was "too obvious to merit extended discussion" was that by then it was well settled that "once [a] federal claim has been *fairly presented* to the state courts, the exhaustion requirement is satisfied." *Picard* v. *Connor*, 404 U. S. 270, 275 (1971) (emphasis added). The Court of Appeals below held, and respondent contends here, that the submission of a new claim to a State's highest court on discretionary review constitutes a fair presentation. We disagree.

Although we have rejected a narrow interpretation of § 2254(c), we have not blue-penciled the provision from the text of the statute. It is reasonable to infer an exception where the State has actually passed upon the claim, as in *Brown;* and where the claim has been presented as of right but ignored (and therefore impliedly rejected), as in *Digmon*. In both those contexts, it is fair to assume that further state proceedings would be useless. Such an assumption is not appropriate, however—and the inference of an exception to the requirement of § 2254(c) is therefore not justified—where the claim has been presented for the first and only time in a procedural context in which its merits will not be considered unless "there are special and important reasons therefor," Pa. Rule App. Proc. 1114. Raising the claim in such a fashion does not, for the relevant purpose, constitute "fair presentation." See *Ex parte Hawk*, 321 U. S. 114 (1944) (application to Nebraska Supreme Court for original writ of habeas corpus does not exhaust state remedies); *Pitchess* v. *Davis*, 421 U. S. 482 (1975) *(per curiam)* (motions to the California Court of Appeal and the California Supreme Court for a pretrial writ of prohibition do not exhaust state remedies).

It follows from what we have said that it was error for the Court of Appeals to rest a conclusion of exhaustion upon respondent's presentation of his claims in petitions for allocatur. The requisite exhaustion may nonetheless exist, of course, if it is clear that respondent's claims are now procedurally barred under Pennsylvania law. See, *e. g.*, *Engle* v.

Isaac, 456 U. S. 107, 125–126, n. 28 (1982); *Teague* v. *Lane*, *ante*, at 297–298. We leave that question for the Court of Appeals. The judgment of the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES *v.* STUART ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87–1064. Argued December 5, 1988—Decided February 28, 1989

Articles XIX and XXI of the 1942 Convention Respecting Double Taxation (1942 Convention) between the United States and Canada require the United States, upon request and consistent with United States revenue laws, to obtain and convey information to Canadian authorities to assist them in determining a Canadian taxpayer's income tax liability. Respondent Canadian citizens and residents maintained accounts in a bank in the United States. In attempting to ascertain their Canadian income tax liability for certain years, the Canadian Department of National Revenue (Revenue Canada), pursuant to Articles XIX and XXI, requested the Internal Revenue Service (IRS) to provide pertinent bank records. After the IRS Director of Foreign Operations concluded that the requests fell within the 1942 Convention's scope and that it would be appropriate for the United States to honor them, the IRS served on the bank administrative summonses for the requested information, but, at respondents' request, the bank refused to comply. Respondents then petitioned the Federal District Court to quash the summonses, contending that because under 26 U. S. C. § 7602(c) the IRS may not issue a summons to further its investigation of a United States taxpayer when a Justice Department referral for possible criminal prosecution is in effect and because Revenue Canada's investigation of respondents was "a criminal investigation, preliminary stage," United States law proscribed the use of a summons to obtain information for Canadian authorities regarding respondents' American bank accounts. This argument was rejected, and the District Court ordered the bank to comply with the summonses. The Court of Appeals reversed, holding that before the IRS may honor a request for information under the 1942 Convention it must determine that Revenue Canada's investigation has not reached a stage analogous to a Justice Department referral by the IRS and that here the affidavit submitted by the IRS failed to state that such a determination had been made with respect to Revenue Canada's investigation of respondents.

Held: Neither the 1942 Convention nor domestic legislation requires the IRS to attest that a Canadian tax investigation has not reached a stage analogous to a Justice Department referral by the IRS in order to obtain enforcement of a summons issued pursuant to a request by Canadian authorities under the 1942 Convention. So long as the IRS satisfies

the requirements of good faith set forth in *United States* v. *Powell*, 379 U. S. 48, 57–58—that the investigation be conducted for and relevant to a legitimate purpose, that the information sought not be already in the IRS' possession, and that the statutorily required administrative steps have been followed—and complies with applicable statutes, it is entitled to enforcement of its summons, whether or not the Canadian tax investigation is directed towards criminal prosecution under Canadian law. Pp. 359–370.

(a) Aside from whether the 1942 Convention, in conjunction with 26 U. S. C. § 7602(c), narrows the class of legitimate purposes for which the IRS may issue an administrative summons, the IRS' affidavits plainly satisfied the requirements of good faith set forth in *United States* v. *Powell*, *supra*. Pp. 359–361.

(b) Section 7602(c) does not, by its terms, apply to the summonses challenged in this case, for its speaks only to investigation into possible violations of United States revenue laws, forbidding the issuance of a summons "if a Justice Department referral is in effect." Therefore, § 7602(c) does not itself appear to bar enforcement of the summonses in question. This conclusion is supported by § 7602(c)'s legislative history indicating that Congress did not intend to make enforcement of a treaty summons contingent upon the foreign tax investigation's not having reached a stage analogous to a Justice Department referral. The concerns that prompted Congress to enact § 7602(c)—particularly that of preventing the IRS from encroaching upon the rights of potential criminal defendants—are not present when the IRS issues summonses at the request of most foreign governments conducting investigations into possible violations of their own tax laws. This is especially so where none of the countries, including Canada, with whom the United States has tax treaties providing for exchanges of information employ grand juries and criminal discovery procedures differ considerably among those countries. Pp. 361–365.

(c) Articles XIX and XXI of the 1942 Convention on their face do not support respondents' argument that because the IRS would not be able, under American law, to issue an administrative summons to gather information for use by the Government once a Justice Department referral was in effect, the IRS is not in a position to obtain such information once Canadian authorities have reached a corresponding stage in their investigation. Those Articles both refer to information that the IRS may obtain under American law, but that law does not contain the restriction respondents claim. Section 7602(c) only limits the issuance of a summons when a Justice Department referral is in effect and says nothing about foreign officials' decisions to investigate possible violations of their countries' laws with a view to criminal prosecution outside the United States. The elements of good faith outlined in *United States* v. *Powell*,

supra, do not constitute such a restriction, nor does the reasoning in *United States* v. *LaSalle National Bank*, 437 U. S. 298, whose principal holding was codified in § 7602(c), favor respondents' position, since the provision of information to Canadian authorities could not curtail the rights of potential criminal defendants in this country by undermining American discovery rules or diminishing the grand jury's role. Moreover, the purpose behind Articles XIX and XXI—the reduction of tax evasion by allowing signatories to demand information from each other—counsels against interpreting those provisions to limit inquiry in the manner respondents desire; the Government's regular compliance with Canadian authorities' requests for information without inquiring whether they intend to use the information for criminal prosecution weighs in favor of its reading of Articles XIX and XXI; and the result urged by respondents would contravene Congress' main reason for laying down an easily administrable test in § 7602(c). Pp. 365–370.

813 F. 2d 243, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and in all but Part II–C of which O'CONNOR and KENNEDY, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 370. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 371.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Rose*, *Alan I. Horowitz*, *Charles E. Brookhart*, and *John A. Dudeck, Jr.*

Charles E. Peery argued the cause for respondents. On the brief was *Brian L. McEachron.*

JUSTICE BRENNAN delivered the opinion of the Court.

Articles XIX and XXI of the Convention between the United States and Canada Respecting Double Taxation, Mar. 4, 1942, 56 Stat. 1405–1406, T. S. No. 983, oblige the United States, upon request and consistent with United States revenue laws, to obtain and convey information to Canadian authorities to assist them in determining a Canadian taxpayer's income tax liability. The question presented is whether the United States Internal Revenue Service may issue an administrative summons pursuant to a request by Canadian au-

thorities only if it first determines that the Canadian tax investigation has not reached a stage analogous to a domestic tax investigation's referral to the Justice Department for criminal prosecution. We hold that neither the 1942 Convention nor domestic legislation imposes this precondition to issuance of an administrative summons. So long as the summons meets statutory requirements and is issued in good faith, as we defined that term in *United States* v. *Powell*, 379 U. S. 48, 57–58 (1964), compliance is required, whether or not the Canadian tax investigation is directed toward criminal prosecution under Canadian law.

I

Respondents are Canadian citizens and residents who maintained bank accounts with the Northwestern Commercial Bank in Bellingham, Washington. In attempting to ascertain their Canadian income tax liability for 1980, 1981, and 1982, the Canadian Department of National Revenue (Revenue Canada) asked the Internal Revenue Service (IRS) in January 1984 to secure and provide pertinent bank records. Revenue Canada made its requests pursuant to Articles XIX and XXI of the 1942 Convention.[1] The IRS Director of For-

[1] Articles XIX and XXI of the Convention between the United States and Canada Respecting Double Taxation, Mar. 4, 1942, 56 Stat. 1405–1406, T. S. No. 983, provide in part:

"ARTICLE XIX

"With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State, as provided in the succeeding Articles of this Convention, the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates.

"The information to be furnished under the first paragraph of this Article, whether in the ordinary course or on request, may be exchanged directly between the competent authorities of the two contracting States."

"ARTICLE XXI

"1. If the Minister in the determination of the income tax liability of any person under any of the revenue laws of Canada deems it necessary to se-

eign Operations—the "competent authority" under Article XIX—concluded that Revenue Canada's requests fell within the scope of the Convention and that it would be appropriate for the United States to honor them. App. 27–28. Specifically, he found that "the requested information is not within the possession of the Internal Revenue Service or the Canadian tax authorities; that the requested information may be relevant to a determination of the correct tax liability of [respondents] under Canadian law; and that the same type of information can be obtained by tax authorities under Canadian law." *Id.*, at 28. Thus, on April 2, 1984, the IRS served on Northwestern Commercial Bank administrative summonses for the requested information.

At respondents' behest, the bank refused to comply. In accordance with 26 U. S. C. § 7609(b)(2), respondents petitioned the United States District Court for the Western District of Washington to quash the summonses. Only one of their claims is before us. Respondents contended that because the IRS may not issue a summons to further its investigation of a United States taxpayer when a Justice Department referral is in effect, 26 U. S. C. § 7602(c), and because Revenue Canada's investigation of each of them was, in the words of the IRS Director of Foreign Operations, "a criminal investigation, preliminary stage," App. 28, United States law proscribed the use of a summons to obtain information for Canadian authorities regarding respondents' American bank accounts. The Magistrate who held a consolidated hearing on respondents' claims rejected this argument. Without addressing their contention that the IRS may not issue a summons pursuant to a request by Revenue Canada once a Canadian tax investigation has reached a stage equivalent to a Justice Department referral for criminal prosecution, the

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cure the cooperation of the Commissioner, the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America."

Magistrate found that, even if respondents' legal claims were assumed to have merit, they had failed to carry their burden of showing that the Canadian authorities' investigation had advanced that far. App. to Pet. for Cert. 31a. Upon considering the Magistrate's report and respondents' objections to it, the District Court ordered the bank to comply with the summonses. *Id.*, at 25a–26a, 34a–35a.

After the Court of Appeals for the Ninth Circuit stayed the enforcement orders pending appeal, a divided panel of the court reversed. 813 F. 2d 243 (1987). The Ninth Circuit held that a summons issued pursuant to a request under the 1942 Convention, like one issued as part of a domestic tax investigation, will be enforced only if it was issued in good faith. The Court of Appeals further stated that the elements of good faith we described in *United States* v. *Powell*, *supra*, at 57–58, are not exhaustive; rather, in light of our subsequent decision in *United States* v. *LaSalle National Bank*, 437 U. S. 298 (1978), and Congress' enactment of what is now 26 U. S. C. § 7602(c), good faith in domestic tax investigations also requires that the IRS not have referred the case to the Justice Department for possible criminal prosecution. Finally, and most significantly for purposes of this litigation, the Ninth Circuit ruled that the IRS acts in good faith in complying with a request for information under the 1942 Convention only when Canadian authorities act in good faith in seeking IRS assistance, and that the good faith of Canadian authorities should be judged by the same standard applicable to the IRS when it conducts a domestic investigation. Hence, the Court of Appeals concluded, before the IRS may honor a request for information it must determine that Revenue Canada's investigation has not reached a stage analogous to a Justice Department referral by the IRS. In addition, the Court of Appeals said, "in order to establish its prima facie case by affidavit, the IRS must make an affirmative statement" that Canadian authorities are acting in good

faith and that their investigation has not yet reached that stage; the burden of proof on this point rests initially with the IRS rather than the taxpayer attempting to quash a summons, the court held, because the IRS "can consult with Canada's competent authority and can be expected to have greater familiarity with Canadian administrative procedures." 813 F. 2d, at 250. The Court of Appeals reversed the District Court's decision because the affidavits submitted by the IRS failed to state that Revenue Canada's investigation of respondents had not yet reached a point analogous to an IRS referral to the Justice Department.

We granted certiorari, 485 U. S. 1033 (1988), to resolve a conflict between the Ninth Circuit's decision in this case and the Second Circuit's holding in *United States* v. *Manufacturers & Traders Trust Co.*, 703 F. 2d 47 (1983). We now reverse.

II

A

In *United States* v. *Powell*, *supra*, we rejected the claim that the IRS must show probable cause to obtain enforcement of an administrative summons issued in connection with a domestic tax investigation. See *id.*, at 52–57. We held instead that the IRS need only demonstrate good faith in issuing the summons, which we defined as follows:

> "[The IRS Commissioner] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed—in particular, that the 'Secretary or his delegate,' after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect." *Id.*, at 57–58.

Once the IRS has made such a showing, we stated, it is entitled to an enforcement order unless the taxpayer can show that the IRS is attempting to abuse the court's process. "Such an abuse would take place," we said, "if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Id.*, at 58. See also *United States* v. *Bisceglia*, 420 U. S. 141, 146 (1975). The taxpayer carries the burden of proving an abuse of the court's process. 379 U. S., at 58.

Leaving aside the question whether the 1942 Convention, in conjunction with 26 U. S. C. § 7602(c), narrows the class of legitimate purposes for which the IRS may issue an administrative summons, the affidavits the IRS submitted in respondents' cases plainly satisfied the requirements of good faith we set forth in *Powell* and have repeatedly reaffirmed. See, *e. g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U. S. 310, 321 (1985); *United States* v. *Arthur Young & Co.*, 465 U. S. 805, 813, n. 10 (1984). The IRS Director of Foreign Operations stated under oath that the information sought was not within the possession of American or Canadian tax authorities, that it might be relevant to the computation of respondents' Canadian tax liabilities, and that the same type of information could be obtained by Canadian authorities under Canadian law. App. 28. He further noted that the "[e]xchanged information may only be disclosed as required in the normal administrative or judicial process operative in the administration of the tax system of the requesting country," and that improper use of exchanged information would be protested. *Ibid.* In addition, the IRS issued its summonses in conformity with applicable statutes and duly informed respondents of their issuance. In their petitions to quash, respondents nowhere alleged that the IRS was trying to use the District Court's process for some improper purpose, such as harassment or the acquisition of

bargaining power in connection with some collateral dispute. See *id.*, at 18–20. Nor does it appear that they later sought to prove abuse of process. Unless 26 U. S. C. § 7602(c) or the 1942 Convention imposes more stringent requirements on the enforcement of the administrative summonses issued in this case, the IRS was entitled to enforcement orders under the rule laid down in *Powell*.

B

Section 7602(c) does impose an additional constraint on the issuance of summonses to further domestic tax investigations.[2] By its terms, however, it does not apply to the sum-

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[2] Section 7602(c) of Title 26 reads:

"(c) No administrative summons when there is Justice Department referral

"(1) Limitation of authority

"No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

"(2) Justice Department referral in effect

"For purposes of this subsection—

"(A) In general

"A Justice Department referral is in effect with respect to any person if—

"(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

"(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

"(B) Termination

"A Justice Department referral shall cease to be in effect with respect to a person when—

"(i) the Attorney General notifies the Secretary, in writing, that—

"(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

monses challenged by respondents, for it speaks only to investigations into possible violations of United States revenue laws. Section 7602(c) forbids the issuance of a summons "if a Justice Department referral is in effect" with respect to a person about whom information is sought by means of the summons. At the time of the District Court's decision, no Justice Department referral was in effect with regard to respondents; indeed, the IRS agent seeking the bank records to fulfill Revenue Canada's request said in her affidavit that no domestic tax investigation of any kind was pending. See App. 30. Section 7602(c) therefore does not itself appear to bar enforcement of the summonses at issue here.[3]

The legislative history of § 7602(c) supports this conclusion. Prior to its enactment, we held in *United States* v. *LaSalle National Bank*, 437 U. S. 298 (1978), that the IRS may not issue a summons once it has recommended prosecution to the Justice Department, nor may it circumvent this requirement

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"(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

"(III) he will discontinue such a grand jury investigation.

"(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

"(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).

"(3) Taxable years, etc., treated separately

"For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately."

[3] We need not, and do not, decide whether the IRS could issue a summons to honor a treaty request if the individual under investigation by the requesting foreign government were also under investigation by American authorities and a Justice Department referral were in effect with respect to him. Nor do we address the question whether the IRS could use in a criminal prosecution evidence it obtained from Canadian authorities pursuant to a treaty request made while a Justice Department referral was in effect.

by delaying such a recommendation in order to gather additional information. We based our holding in large part on our finding that "[n]othing in § 7602 or its legislative history suggests that Congress intended the summons authority to broaden the Justice Department's right of criminal litigation discovery or to infringe on the role of the grand jury as a principal tool of criminal accusation." *Id.*, at 312 (citations omitted). When Congress codified the essence of our holding in § 7602(c), it apparently shared our concern about permitting the IRS to encroach upon the rights of potential criminal defendants. The Report of the Senate Finance Committee noted that "the provision is in no way intended to broaden the Justice Department's right of criminal discovery or to infringe on the role of the grand jury as a principal tool of criminal prosecution." S. Rep. No. 97–494, Vol. 1, p. 286 (1982).

This explanation for the restriction embodied in § 7602(c) suggests that Congress did not intend to make the enforcement of a treaty summons contingent upon the foreign tax investigation's not having reached a stage analogous to a Justice Department referral. None of the civil-law countries with whom the United States has tax treaties providing for exchanges of information employ grand juries, and Canada has ceased to use them.[4] Moreover, criminal discovery procedures differ considerably among countries with whom we have such treaties.[5] The concerns that prompted Congress

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[4] See the Criminal Law Amendment Act, 1985, ch. 19, §§ 113–115, reprinted in Revised Statutes of Canada, ch. 27, §§ 113–115 (Supp. I 1985). See also *McKibbon* v. *Queen*, [1984] 1 S. C. R. 131, 137–157, 6 D. L. R. 4th 1, 20–35 (1984) (recounting the history of grand juries in Canada). Other common-law countries have eliminated the grand jury as well. See, *e. g.*, *Saywell* v. *Attorney-General*, [1982] 2 N. Z. L. R. 97, 100–105 (H. C.) (discussing consequences for presentation of indictment of abolition of grand juries in New Zealand, England, and Australia).

[5] As of September 30, 1988, the United States had in force income tax conventions containing exchange of information provisions with over 30 countries, ranging from France to Poland to Japan. Fogarasi, Gordon,

to pass § 7602(c) are therefore not present when the IRS issues summonses at the request of most foreign governments conducting investigations into possible violations of their own tax laws. If Congress had intended § 7602(c) to impose a restriction on the issuance of summonses pursuant to treaty requests parallel to the restriction it expressly imposes on summonses issued by the IRS in connection with domestic tax investigations, it would presumably have offered some reason for extending the sweep of the section beyond its plain language. In addition, Congress would likely have discussed the appropriateness of extending the protections afforded by United States law to citizens of other countries who are not subject to criminal prosecution here, and would doubtless have considered the problems posed by the application of § 7602(c) to requests by treaty partners, in particular the difficulty of determining when a foreign investigation has progressed to a point analogous to a Justice Department referral.[6] Respondents have not directed us, however, to any-

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Venuti, & Renfroe, Current Status of U. S. Tax Treaties, 17 Tax Mgmt. Int'l J. 507, 509 (1988). Not all of those countries distinguish between civil and criminal prosecutions for tax offenses as does the United States. In some Swiss Cantons, for example, tax fraud—the most severe offense—is prosecuted in the administrative rather than in the criminal courts, and a single administrative agency investigates and prosecutes all tax offenses. See Meier, Banking Secrecy in Swiss and International Taxation, 7 Int'l Law. 16, 26 (1973).

[6]The difficulty of finding the equivalent of a Justice Department referral is particularly acute in Canadian tax investigations. Although criminal prosecution is centered in Canadian attorneys-general, just as criminal prosecution in the United States falls within the province of the Justice Department, "[t]he similarity appears to stop there." Scheim & Cantillon Ross, Stuart v. United States: Standards for Section 7602 Summons in Treaty Matters, 17 Tax Mgmt. Int'l J. 479, 482 (1988). Revenue Canada routinely gathers virtually all of the information necessary for criminal prosecution before turning a case over to the Canadian Justice Department, see *id.*, at 482–484, and available Canadian agency manuals suggest "that a case is referred to Justice only when it is already in a stage amenable to Court presentation, and that some degree of cooperation continues after that point." *Id.*, at 482. Scheim and Cantillon Ross conclude: "It

thing in the legislative history of § 7602(c) suggesting that Congress intended it to apply to summonses issued pursuant to treaty requests, or to any reference to the problems its application would have occasioned. We therefore see no reason to think that § 7602(c) means more than it says.

C

The only conceivable foundation for the Ninth Circuit's rule that an IRS summons issued at the request of Canadian authorities may not be enforced unless the IRS provides assurance that the Canadian investigation has not proceeded to a stage analogous to a Justice Department referral is therefore the language of the 1942 Convention itself. Article XIX obliges the competent authority for the United States to furnish, upon request, relevant information that it is "in a position to obtain under its revenue laws." Article XXI repeats this clause almost verbatim, permitting the IRS Commissioner to supply Canadian authorities with relevant information he "is entitled to obtain under the revenue laws of the United States of America." Respondents contend that because the IRS would not be able, under American law, to issue an administrative summons to gather information for use by the Government once a Justice Department referral was in effect, the IRS is not in a position to obtain such information once Canadian authorities have reached a corresponding stage in their investigation.

(1)

We are not persuaded by this argument. "The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations

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appears therefore that [Revenue Canada] adopts an institutional posture tilted towards prosecution well before referral." *Ibid.* If this conclusion is correct, then it might be difficult in at least some cases to determine whether a Canadian tax investigation has reached a point analogous to a Justice Department referral by the IRS.

of its signatories.'" *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U. S. 176, 180 (1982), quoting *Maximov* v. *United States*, 373 U. S. 49, 54 (1963). Articles XIX and XXI both refer to information that the IRS may obtain under American law. American law, however, does not contain the restriction respondents claim to find there. Section 7602(c) only limits the issuance of summonses when a Justice Department referral is in effect; it says nothing about decisions by foreign tax officials to investigate possible violations of their countries' tax laws with a view to criminal prosecution outside the United States. The elements of good faith we outlined in *United States* v. *Powell*, 379 U. S. 48 (1964), do not contain such a restriction. Nor does our reasoning in *United States* v. *LaSalle National Bank*, 437 U. S. 298 (1978), favor the result respondents urge, because the provision of information to Canadian authorities could not curtail the rights of potential criminal defendants in this country by undermining American discovery rules or diminishing the role of the grand jury. And respondents have not suggested that some other segment of American law, such as the law of privilege, prevents the IRS from issuing an administrative summons pursuant to a treaty request once a treaty partner has embarked on a tax investigation leading to a foreign criminal prosecution. Articles XIX and XXI of the 1942 Convention on their face therefore lend no support to respondents' position.

(2)

Nontextual sources that often assist us in "giving effect to the intent of the Treaty parties," *Sumitomo*, *supra*, at 185, such as a treaty's ratification history and its subsequent operation, further fail to sustain respondents' claim. The Senate Committee on Foreign Relations did not hold hearings on the Convention prior to its ratification in 1942, and the Committee Report did not even mention the provisions for exchange of information. See S. Exec. Rep. No. 3, 77th Cong., 2d Sess. (1942), 1 Legislative History of United States Tax Con-

ventions (Committee Print compiled by the Staff of the Joint Committee on Internal Revenue Taxation) 455 (1962) (Leg. Hist.). The sole reference to these provisions during the brief floor debate in the Senate contained no hint that the 1942 Convention was intended to incorporate domestic restrictions on the issuance of summonses by the IRS in connection with American tax investigations, such as the limitation later codified in § 7602(c).[7] The President's message

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[7] Contrary to JUSTICE SCALIA's suggestion, see *post*, at 377, the Government relied on the preratification Senate debate in its brief, see Brief for United States 29, and n. 11, pointing out that the only reference to intergovernmental exchanges of information came in the following colloquy:

"Mr. TAFT . . .

"In other words, if an American citizen were using a Canadian bank deposit to evade income taxation, I think the convention would permit the United States Government to ask the Canadian Government to obtain information from its own bank and furnish it to this Government in connection with the enforcement of our internal-revenue laws.

"Mr. GEORGE. It does provide for exchange of information, as the Senator from Ohio points out." 88 Cong. Rec. 4714 (1942).

Nor is reliance on the Senate's preratification debates and reports improper. As JUSTICE SCALIA acknowledges, the American Law Institute's most recent Restatement counsels consideration of such materials. See Restatement (Third) of Foreign Relations Law of the United States § 314, Comment *d* (1987) ("indication that . . . the Senate ascribed a particular meaning to the treaty is relevant"); *id.*, § 325, Reporters' Note 5 ("A court . . . is required to take into account . . . (i) Committee reports, debates, and other indications of meaning that the legislative branch has attached to an agreement . . . "). Consultation of these materials is eminently reasonable. *Pace* JUSTICE SCALIA, reviewing preratification Senate debates and reports is not akin to "determining the meaning of a bilateral contract between two corporations on the basis of what the board of directors of one of them thought it meant when authorizing the chief executive officer to conclude it." *Post*, at 374. Senate debates do not occur behind closed doors, out of earshot of proposed treaty partners, nor are preratification Senate reports kept under seal. Both are public statements. They therefore bear no resemblance to the private deliberations of a board of directors prior to the board's decision whether to authorize the chief executive officer to sign an agreement. Insofar as the contract analogy is apt, the better comparison is to a meeting of the board whose minutes and position pa-

accompanying transmittal of the proposed treaty to the Senate, see S. Exec. Doc. B, 77th Cong., 2d Sess. (1942), reprinted in Leg. Hist. 445, and the President's Proclamation at the time the Convention was signed, see Leg. Hist. 475, 56 Stat. 1399, similarly contain no language supporting respondents' argument. Indeed, given that a treaty should generally be "construe[d] . . . liberally to give effect to the purpose which animates it" and that "[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred," *Bacardi Corp. of America* v. *Domenech*, 311 U. S. 150, 163 (1940) (citations omitted), the evident purpose behind Articles XIX and XXI—the reduction of tax evasion by allowing signatories to demand information from each other—counsels against interpreting those provisions to limit inquiry in the manner respondents desire. In any event, nothing in the history of the Convention's ratification buttresses respondents' claim.[8]

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pers the other corporation's board and chief executive officer are invited to peruse. It is hornbook contract law that the proper construction of an agreement is that given by one of the parties when "that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party." Restatement (Second) of Contracts § 201(2)(b) (1981). See also E. Farnsworth, Contracts 487–488 (1982). A treaty's negotiating history, which JUSTICE SCALIA suggests would be a better interpretive guide than preratification Senate materials, see *post*, at 374, would in fact be a worse indicator of a treaty's meaning, for that history is rarely a matter of public record available to the Senate when it decides to grant or withhold its consent.

[8] A new United States-Canada Income Tax Convention became effective August 16, 1984, after the summonses involved in this case were issued. 1986–2 Cum. Bull. 258. Article XXVII of the new Convention closely resembles Articles XIX and XXI of the 1942 Convention. Yet neither the new Convention nor its supplementary protocols suggest any limitation on United States compliance with a treaty request dependent upon the status of a Canadian tax investigation. The hearing before the Senate Foreign Relations Committee, see Hearing on Tax Treaties before the Senate Committee on Foreign Relations, 97th Cong., 1st Sess., 1–115 (1981), the technical explanation of the new Convention, see 1986–2 Cum.

(3)

Nor do other aids to interpretation strengthen their case. The practice of treaty signatories counts as evidence of the treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed. See *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U. S. 243, 259 (1984); *Factor* v. *Laubenheimer*, 290 U. S. 276, 294–295 (1933). The Government's regular compliance with requests for information by Canadian authorities without inquiring whether they intend to use the information for criminal prosecution therefore weighs in favor of its reading of Articles XIX and XXI. Similarly, "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo*, 457 U. S., at 184–185. See also *Kolovrat* v. *Oregon*, 366 U. S. 187, 194 (1961). The IRS' construction of the 1942 Convention repudiates rather than confirms the interpretation respondents ask us to adopt. Finally, the result urged by respondents would contravene Congress' main reason for laying down an easily administrable test in § 7602(c): "[S]ummons enforcement proceedings should be summary in nature and discovery should be limited." S. Rep. No. 97–494, Vol. 1, p. 285 (1982). If respondents had their way, disputes would inevitably arise over whether a Canadian tax investigation had progressed to a point analogous to a Justice Department referral when Revenue Canada made its request for information, thereby "spawn[ing] protracted litigation without any meaningful results for the taxpayer." *Ibid.* It seems unlikely that Congress would have welcomed this re-

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Bull. 275, 294, and the perfunctory ratification debate in the Senate, see 130 Cong. Rec. 19504–19509, 19512–19513 (1984), are similarly silent on this point. Thus, the Senate apparently did not believe that in ratifying the new Convention it was giving respondents' claim the force of law, just as it did not appear to think, from the legislative history it left behind, that § 7602(c) accomplished that end on its own.

sult when it ratified the 1942 Convention, or that Congress intended it when it approved the bill containing what is presently § 7602(c).

III

We conclude that the IRS need not attest that a Canadian tax investigation has not yet reached a stage analogous to a Justice Department referral by the IRS in order to obtain enforcement of a summons issued pursuant to a request by Canadian authorities under the 1942 Convention. So long as the IRS itself acts in good faith, as that term was explicated in *United States* v. *Powell*, 379 U. S., at 57–58, and complies with applicable statutes, it is entitled to enforcement of its summons. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, concurring in part and concurring in the judgment.

It is quite unnecessary for the resolution of this case to explore or discuss the Senate proceedings that led to ratification of the 1942 Convention Respecting Double Taxation; for, as the Court unanimously agrees, the text of the Treaty is quite sufficient to decide the issue before us. The intent of the Treaty's signatories is manifest from the language of the document itself. I agree with JUSTICE SCALIA that we should not reach, either in a direct or an implicit way, the question whether Senate debates on ratification are authoritative or even helpful in determining what the signatories to a treaty intended. That determination should be reserved until we confront a case where the language of the treaty itself does not yield a clear answer to the question before us. For these reasons, I join the judgment of the Court and all but Part II–C of the Court's opinion.

JUSTICE SCALIA, concurring in the judgment.

I concur only in the judgment of the Court because I believe that the text of Articles XIX and XXI of the Convention between the United States and Canada Respecting Double Taxation, Mar. 4, 1942, 56 Stat. 1405–1406, T. S. No. 983, is completely dispositive of respondents' claim under the agreement. The Court apparently agrees. See *ante*, at 365–366. Given that the Treaty's language resolves the issue presented, there is no necessity of looking further to discover "the intent of the Treaty parties," *ante*, at 366, and special reason to avoid the particular materials that the Court unnecessarily consults.

I

Of course, no one can be opposed to giving effect to "the intent of the Treaty parties." The critical question, however, is whether that is more reliably and predictably achieved by a rule of construction which credits, when it is clear, the contracting sovereigns' carefully framed and solemnly ratified expression of those intentions and expectations, or rather one which sets judges in various jurisdictions at large to ignore that clear expression and discern a "genuine" contrary intent elsewhere. To ask that question is to answer it.

One can readily understand the appeal of making the additional argument that the plain language of a treaty (which is conclusive) does indeed effectuate the genuine intent as shown elsewhere—just as one can understand the appeal, in statutory cases, of pointing out that what the statute provides (which is conclusive) happens to be sound social policy. But using every string to one's bow in this fashion has unfortunate implications. ("It would be wrong; and besides, it wouldn't work.") Here the implication is that, *had* the extrinsic evidence contradicted the plain language of the Treaty it would govern. That is indeed what we mistakenly said in the earlier case that the Court cites as authority for its approach. In *Sumitomo Shoji America, Inc.* v. *Avagliano*,

457 U. S. 176, 180 (1982), we stated that "'[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' . . . *Maximov* v. *United States*, 373 U. S. 49, 54 (1963)." The authority quoted for that proposition in fact does not support it. In *Maximov*, confronted with an argument appealing to the "intent or expectations" of the signatories, we responded that "[t]he immediate and compelling answer to this contention is that . . . the language of the Convention itself not only fails to support the petitioner's view, but is contrary to it." *Maximov* v. *United States*, 373 U. S. 49, 54 (1963). We then continued: "Moreover, it is *particularly* inappropriate for a court to sanction a deviation from the clear import of a solemn treaty . . . when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Ibid.* (emphasis added). The import of the highlighted adverb is, of course, that it would be inappropriate to sanction a deviation from clear text *even if there were* indications of contrary intent. Our *Sumitomo* dictum separated the last clause of this quotation from its context to support precisely the opposite of what it said. Regrettably, that passage from *Sumitomo* is already being quoted by lower courts as "[t]he general rule in interpreting treaties." *Rainbow Navigation, Inc.* v. *Department of Navy*, 686 F. Supp. 354, 359, n. 25 (DC 1988).

Notwithstanding the *Sumitomo* dictum to which the Court alludes, our traditional rule of treaty construction is that an agreement's language is the best evidence of its purpose and its parties' intent. In *Rocca* v. *Thompson*, 223 U. S. 317 (1912), it was urged upon us that a Treaty granting consuls the right "to intervene in the possession, administration, and judicial liquidation of the estate of the deceased" also granted them the right to administer the property of the deceased,

since that would effectuate the Treaty's "objects and purposes." We conducted no separate inquiry into the intent or expectations of the signatories beyond those expressed in the text, but said simply:

> "[T]reaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms." *Id.*, at 332.

That is the governing principle of interpretation. Only when a treaty provision is ambiguous have we found it appropriate to give authoritative effect to extratextual materials. See, *e. g.*, *Air France* v. *Saks*, 470 U. S. 392, 400 (1985); *Nielsen* v. *Johnson*, 279 U. S. 47, 52 (1929).

II

Even, however, if one generally regards the use of preratification extrinsic materials to confirm an unambiguous text as an innocuous practice, there is special reason to object to that superfluous reference in the present case. What is distinctive here is the nature of the extratextual materials to which the Court unnecessarily refers. To discover Canada's and the United States' "intent and expectations," the Court looks solely to the United States Senate floor debates that preceded the President's ratification of the treaty. *Ante*, at 366–368, and nn. 7–8. The use of such materials is unprecedented. Even where the terms of the treaty are ambiguous, and resort to preratification materials is therefore appropriate, I have been unable to discover a single case in which this Court has consulted the Senate debate, committee hearings, or committee reports. It would be no more appropriate for me than it is for the Court to use the present case as the occa-

sion for pronouncing upon the legitimacy of using such materials, but it is permissible to suggest some of the arguments against it. Using preratification Senate materials, it may be said, is rather like determining the meaning of a bilateral contract between two corporations on the basis of what the board of directors of one of them thought it meant when authorizing the chief executive officer to conclude it. The question before us in a treaty case is what the two or more sovereigns agreed to, rather than what a single one of them, or the legislature of a single one of them, thought it agreed to. And to answer that question accurately, it can reasonably be said, whatever extratextual materials are consulted must be materials that reflect the mutual agreement (for example, the negotiating history) rather than a unilateral understanding. Thus, we have declined to give effect, not merely to Senate debates and committee reports, but even to an explicit condition of ratification adopted by the full Senate, when the President failed to include that in his ratification. We said:

> "The power to make treaties is vested by the Constitution in the President and Senate, and, while this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President. It cannot be considered as a legislative act, since the power to legislate is vested in the President, Senate and House of Representatives. There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it." *New York Indians* v. *United States*, 170 U. S. 1, 23 (1898).

Of course the Senate has unquestioned power to enforce its own understanding of treaties. It may, in the form of a reso-

lution, give its consent on the basis of conditions. If these are agreed to by the President and accepted by the other contracting parties, they become part of the treaty and of the law of the United States, see *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U. S. 335, 351–352 (1945); see also Restatement (Third) of Foreign Relations Law of the United States §314 (1987). If they are not agreed to by the President, his only constitutionally permissible course is to decline to ratify the treaty, and his ratification without the conditions would presumably provide the basis for impeachment. Moreover, if Congress does not like the interpretation that a treaty has been given by the courts or by the President, it may abrogate or amend it as a matter of internal law by simply enacting inconsistent legislation. *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 460 (1899); *Head Money Cases*, 112 U. S. 580, 599 (1884). But it is a far cry from all of this to say that the meaning of a treaty can be determined, not by a reservation attached to the President's ratification at the instance of the Senate, nor even by formal resolution of the Senate unmentioned in the President's ratification, but by legislative history of the sort that we have become accustomed to using for purpose of determining the meaning of domestic legislation.

The American Law Institute's Restatement of the Foreign Relations Law of the United States would permit the courts to refer to materials of the sort at issue here. See Restatement (Third) of Foreign Relations Law of the United States §314, Comment *d* (1987); *id.*, §325, Reporter's Note 5. But despite the title of the work, this must be regarded as a proposal for change rather than a restatement of existing doctrine, since the commentary refers to not a single case, of this or any other United States court, that has employed the practice. The current version of the Restatement provides no explanation for (or even acknowledgment of) this curiosity. An explanation was provided in the Proposed Official Draft of the Second Restatement, which is of some interest:

> "There is virtually no precise decisional authority on this matter, probably because of the domestic interpretative rule, stated in § 155, that executive interpretations of international agreements are given great weight by courts in the United States or because, as explained in Comment *a* to this Section, the courts wish to avoid if possible creating disharmony between the international and the domestic meanings of international agreements." Restatement (Second) of Foreign Relations Law of the United States § 154, Comment *b*(ii) (Prop. Off. Draft 1962).

This is not the case in which to commit ourselves to an approach that significantly reduces what has hitherto been the President's role in the interpretation of treaties, and commits the United States to a form of interpretation plainly out of step with international practice.

It can hardly have escaped the Court's attention that the role of Senate understanding in the treaty ratification process has recently been the subject of some considerable dispute between the Senate and the Executive. See Washington Post, Mar. 19, 1988, p. A11, col. 1 (discussing disagreement on the importance to be accorded to Senate understanding of the Anti-Ballistic Missile Treaty at the time of advice and consent to the President's ratification); Washington Post, Feb. 17, 1988, p. A17, col. 1 (same); Washington Post, Feb. 6, 1988, p. A1, col. 6 (same). The first (and, as far as I am aware, the only) federal decisions relying upon preratification Senate materials for the interpretation of a treaty were issued by the District Court for the District of Columbia, in successive phases of the same controversy, last May, see *Rainbow Navigation, Inc.* v. *Department of Navy*, 686 F. Supp. 354 (1988), and last November, see *Rainbow Navigation, Inc.* v. *Department of Navy*, 699 F. Supp. 339 (1988). In the first of those cases, the court rejected the Government's contention that its representations to the Senate regarding the meaning of a treaty are not binding as to

the treaty's interpretation. See 686 F. Supp., at 357–358, n. 17.* In the second of them, the Government conceded that "authoritative Executive branch representations concerning the meaning of a Treaty which form part of the basis upon which the Senate gives advice and consent are entitled to be accorded binding weight as a matter of domestic constitutional law, and the Executive branch fully accepts that it is bound by such statements." 699 F. Supp., at 343 (quoting Defendants' Reply Brief and Opposition to Plaintiff's Cross-Motion for Summary Judgment 2, n. 2.). It is not clear that this latest position taken by the Government in District Court is correct, or would even be the position taken before us by the Solicitor General. It is even less clear, however, assuming that position to be correct, that Senate understandings which are *not* the product of Executive representations in the advice-and-consent hearings should have any relevance. It is odd, to say the least, that in the present case, where the language of the Treaty is clear, where the role of Senate reports and debates has not even been argued, and where the Solicitor General has not been requested to give us the benefit of his views on that subject, we should reach out to use such materials for the first time in two centuries of treaty construction.

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*The court relied in part upon testimony—reproduced in The ABM Treaty Interpretation Resolution, Report of the Committee on Foreign Relations of the United States Senate, S. Rep. No. 100–164, p. 49 (1987)—by none other than the reporter for the Restatement of Foreign Relations Law, Professor Louis Henkin. Thus, by self-exertion, so to speak, there is now at least one case that the Restatement *almost* restates. The qualifier is needed because, as I discuss later in text, even that case does not go as far as the Restatement (and the Court's opinion today) would do.

CITY OF CANTON, OHIO *v.* HARRIS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 86–1088. Argued November 8, 1988—Decided February 28, 1989

Although respondent fell down several times and was incoherent following her arrest by officers of petitioner city's police department, the officers summoned no medical assistance for her. After her release, she was diagnosed as suffering from several emotional ailments requiring hospitalization and subsequent outpatient treatment. Some time later, she filed suit seeking, *inter alia*, to hold the city liable under 42 U. S. C. § 1983 for its violation of her right, under the Due Process Clause of the Fourteenth Amendment, to receive necessary medical attention while in police custody. The jury ruled in her favor on this claim upon the basis of evidence indicating that a city regulation gave shift commanders sole discretion to determine whether a detainee required medical care, and suggesting that commanders were not provided with any special training to make a determination as to when to summon such care for an injured detainee. Both the District Court, in rejecting the city's motion for judgment notwithstanding the verdict, and the Court of Appeals, in ruling that there had been no error in submitting the "failure to train" claim to the jury, held that, under Circuit precedent, a municipality is liable for failure to train its police force, where the plaintiff proves that the municipality acted recklessly, intentionally, or with gross negligence, and that the lack of training was so reckless or grossly negligent that deprivation of persons' constitutional rights was substantially certain to result. However, upon finding that certain aspects of the District Court's jury instructions might have led the jury to believe that it could find against the city on a mere *respondeat superior* theory, and that the jury's verdict did not state the basis on which it had ruled for respondent, the Court of Appeals reversed the judgment in her favor and remanded the case for a new trial.

Held:

1. The writ of certiorari will not be dismissed as improvidently granted on the basis of respondent's claim that petitioner failed to preserve for review the principal issues before this Court. Since the petition for certiorari directly addressed the critical question here—the § 1983 actionability of a municipality's failure to train—and since respondent's brief in opposition neither raised the objection that petitioner had failed to press its claims on the courts below nor informed this Court

that petitioner had arguably conceded below that inadequate training is actionable, this Court will exercise its discretion to deem these defects waived. *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816. Moreover, even if the asserted failure of petitioner to present the claims it makes here in the same fashion below actually occurred, that failure does not affect this Court's jurisdiction. Pp. 383–385.

2. A municipality may, in certain circumstances, be held liable under § 1983 for constitutional violations resulting from its failure to train its employees. Pp. 385–392.

(a) Petitioner's contention that § 1983 liability can be imposed only where the municipal policy in question is itself unconstitutional is rejected, in light of the rule established by the Court in this case that there are limited circumstances in which a "failure to train" allegation can be the basis for liability. Pp. 386–387.

(b) The inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train in a relevant respect amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact. In contrast to the Court of Appeals' overly broad rule, this "deliberate indifference" standard is most consistent with the rule of *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 694, that a city is not liable under § 1983 unless a municipal "policy" or "custom" is the moving force behind the constitutional violation. Only where a failure to train reflects a "deliberate" or "conscious" choice by the municipality can the failure be properly thought of as an actionable city "policy." *Monell* will not be satisfied by a mere allegation that a training program represents a policy for which the city is responsible. Rather, the focus must be on whether the program is adequate to the tasks the particular employees must perform, and if it is not, on whether such inadequate training can justifiably be said to represent "city policy." Moreover, the identified deficiency in the training program must be closely related to the ultimate injury. Thus, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs. To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983; would result in *de facto respondeat superior* liability, a result rejected in *Monell;* would engage federal courts in an endless exercise of second-guessing municipal employee-training programs, a task that they are ill suited to undertake; and would implicate serious questions of federalism. Pp. 388–392.

3. Although the evidence presently in the record does not satisfy the "deliberate indifference" rule of liability, the question whether respondent should have an opportunity to prove her case under that rule must be left to the Court of Appeals on remand, since the standard of proof the

District Court ultimately imposed on her was a lesser one than the one here adopted. P. 392.

798 F. 2d 1414, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, and in Parts I, II, and III of which O'CONNOR, SCALIA, and KENNEDY, JJ., joined, except as to n. 11. BRENNAN, J., filed a concurring opinion, *post*, p. 393. O'CONNOR, J., filed an opinion concurring in part and dissenting in part, in which SCALIA and KENNEDY, JJ., joined, *post*, p. 393.

Carter G. Phillips argued the cause for petitioner. With him on the briefs were *Mark D. Hopson*, *W. Scott Gwin*, *William J. Hamann*, and *John S. Coury*.

David Rudovsky argued the cause for respondent. With him on the brief were *Emanuella Harris Groves* and *Dexter W. Clark*.*

JUSTICE WHITE delivered the opinion of the Court.

In this case, we are asked to determine if a municipality can ever be liable under 42 U. S. C. § 1983[1] for constitutional violations resulting from its failure to train municipal employees. We hold that, under certain circumstances, such liability is permitted by the statute.

**Benna Ruth Solomon*, *Beate Bloch*, and *Richard K. Willard* filed a brief for the International City Management Association et al. as *amici curiae* urging reversal.

John A. Powell, *Steven R. Shapiro*, *Howard A. Friedman*, and *Michael Aaron Avery* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

[1] Title 42 U. S. C. § 1983 provides, in relevant part, that:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

I

In April 1978, respondent Geraldine Harris was arrested by officers of the Canton Police Department. Mrs. Harris was brought to the police station in a patrol wagon.

When she arrived at the station, Mrs. Harris was found sitting on the floor of the wagon. She was asked if she needed medical attention, and responded with an incoherent remark. After she was brought inside the station for processing, Mrs. Harris slumped to the floor on two occasions. Eventually, the police officers left Mrs. Harris lying on the floor to prevent her from falling again. No medical attention was ever summoned for Mrs. Harris. After about an hour, Mrs. Harris was released from custody, and taken by an ambulance (provided by her family) to a nearby hospital. There, Mrs. Harris was diagnosed as suffering from several emotional ailments; she was hospitalized for one week and received subsequent outpatient treatment for an additional year.

Some time later, Mrs. Harris commenced this action alleging many state-law and constitutional claims against the city of Canton and its officials. Among these claims was one seeking to hold the city liable under 42 U. S. C. § 1983 for its violation of Mrs. Harris' right, under the Due Process Clause of the Fourteenth Amendment, to receive necessary medical attention while in police custody.

A jury trial was held on Mrs. Harris' claims. Evidence was presented that indicated that, pursuant to a municipal regulation,[2] shift commanders were authorized to determine, in their sole discretion, whether a detainee required medical

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[2] The city regulation in question provides that a police officer assigned to act as "jailer" at the city police station

"shall, when a prisoner is found to be unconscious or semi-unconscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to City Jail." App. 33.

care. Tr. 2–139—2–143. In addition, testimony also suggested that Canton shift commanders were not provided with any special training (beyond first-aid training) to make a determination as to when to summon medical care for an injured detainee. *Ibid.;* App. to Pet. for Cert. 4a.

At the close of the evidence, the District Court submitted the case to the jury, which rejected all of Mrs. Harris' claims except one: her § 1983 claim against the city resulting from its failure to provide her with medical treatment while in custody. In rejecting the city's subsequent motion for judgment notwithstanding the verdict, the District Court explained the theory of liability as follows:

> "The evidence construed in a manner most favorable to Mrs. Harris could be found by a jury to demonstrate that the City of Canton had a custom or policy of vesting complete authority with the police supervisor of when medical treatment would be administered to prisoners. Further, the jury could find from the evidence that the vesting of such *carte blanche* authority with the police supervisor without adequate training to recognize when medical treatment is needed was grossly negligent or so reckless that future police misconduct was almost inevitable or substantially certain to result." *Id.*, at 16a.

On appeal, the Sixth Circuit affirmed this aspect of the District Court's analysis, holding that "a municipality is liable for failure to train its police force, [where] the plaintiff . . . prove[s] that the municipality acted recklessly, intentionally, or with gross negligence." *Id.*, at 5a.[3] The Court of Appeals also stated that an additional prerequisite of this theory

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[3] In upholding Mrs. Harris' "failure to train" claim, the Sixth Circuit relied on two of its previous decisions which had approved such a theory of municipal liability under § 1983. See *Rymer* v. *Davis*, 754 F. 2d 198, vacated and remanded *sub nom. Shepherdsville* v. *Rhymer*, 473 U. S. 901, reinstated, 775 F. 2d 756, 757 (1985); *Hays* v. *Jefferson County*, 668 F. 2d 869, 874 (1982).

of liability was that the plaintiff must prove "that the lack of training was so reckless or grossly negligent that deprivations of persons' constitutional rights were substantially certain to result." *Ibid.* Thus, the Court of Appeals found that there had been no error in submitting Mrs. Harris' "failure to train" claim to the jury. However, the Court of Appeals reversed the judgment for respondent, and remanded this case for a new trial, because it found that certain aspects of the District Court's jury instructions might have led the jury to believe that it could find against the city on a mere *respondeat superior* theory. Because the jury's verdict did not state the basis on which it had ruled for Mrs. Harris on her § 1983 claim, a new trial was ordered.

The city petitioned for certiorari, arguing that the Sixth Circuit's holding represented an impermissible broadening of municipal liability under § 1983. We granted the petition. 485 U. S. 933 (1988).

II

We first address respondent's contention that the writ of certiorari should be dismissed as improvidently granted, because "petitioner failed to preserve for review the principal issues it now argues in this Court." Brief for Respondent 5.

We think it clear enough that petitioner's three "Questions Presented" in its petition for certiorari encompass the critical question before us in this case: Under what circumstances can inadequate training be found to be a "policy" that is actionable under § 1983? See Pet. for Cert. i. The petition itself addressed this issue directly, attacking the Sixth Circuit's "failure to train" theory as inconsistent with this Court's precedents. See *id.*, at 8–12. It is also clear—as respondent conceded at argument, Tr. of Oral Arg. 34, 54—that her brief in opposition to our granting of certiorari did not raise the objection that petitioner had failed to press its claims on the courts below.

As to respondent's contention that the claims made by petitioner here were not made in the same fashion below, that

failure, if it occurred, does not affect our jurisdiction; and because respondent did not oppose our grant of review at that time based on her contention that these claims were not pressed below, we will not dismiss the writ as improvidently granted. "[T]he 'decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits . . . of the questions presented in the petition.'" *St. Louis* v. *Praprotnik*, 485 U. S. 112, 120 (1988) (quoting *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985)). As we have expressly admonished litigants in respondent's position: "Nonjurisdictional defects of this sort should be brought to our attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived." *Tuttle*, *supra*, at 816.

It is true that petitioner's litigation posture with respect to the questions presented here has not been consistent; most importantly, petitioner conceded below that "'inadequate training' [is] a means of establishing municipal liability under Section 1983." Reply Brief for Petitioner 4, n. 3; see also Petition for Rehearing in No. 85–3314 (CA6), p. 1. However, at each stage in the proceedings below, petitioner contested any finding of liability on this ground, with objections of varying specificity. It opposed the District Court's jury instructions on this issue, Tr. 4–369; claimed in its judgment notwithstanding verdict motion that there was "no evidence of a . . . policy or practice on the part of the City . . . [of] den[ying] medical treatment to prisoners," Motion for Judgment Notwithstanding Verdict in No. C80–18–A (ND Ohio), p. 1; and argued to the Court of Appeals that there was no basis for finding a policy of denying medical treatment to prisoners in this case. See Brief for Appellant in No. 85–3314 (CA6), pp. 26–29. Indeed, petitioner specifically contended that the Sixth Circuit precedents that permitted inadequate training to be a basis for municipal liability on facts similar to these, see n. 3, *supra*, were in conflict with

our decision in *Tuttle*. Brief for Appellant in No. 85–3314 (CA6), p. 29. These various presentations of the issues below might have been so inexact that we would have denied certiorari had this matter been brought to our attention at the appropriate stage in the proceedings. But they were at least adequate to yield a decision by the Sixth Circuit on the questions presented for our review now.

Here the Sixth Circuit held that where a plaintiff proves that a municipality, acting recklessly, intentionally, or with gross negligence, has failed to train its police force—resulting in a deprivation of constitutional rights that was "substantially certain to result"— § 1983 permits that municipality to be held liable for its actions. Petitioner's petition for certiorari challenged the soundness of that conclusion, and respondent did not inform us prior to the time that review was granted that petitioner had arguably conceded this point below. Consequently, we will not abstain from addressing the question before us.

III

In *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), we decided that a municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983. *Id.*, at 694–695. "It is only when the 'execution of the government's policy or custom . . . inflicts the injury' that the municipality may be held liable under § 1983." *Springfield* v. *Kibbe*, 480 U. S. 257, 267 (1987) (O'CONNOR, J., dissenting) (quoting *Monell*, *supra*, at 694).

Thus, our first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. The inquiry is a difficult one; one that has left this Court deeply divided in a series of

cases that have followed *Monell*;[4] one that is the principal focus of our decision again today.

A

Based on the difficulty that this Court has had defining the contours of municipal liability in these circumstances, petitioner urges us to adopt the rule that a municipality can be found liable under § 1983 only where "the policy in question [is] itself unconstitutional." Brief for Petitioner 15. Whether such a rule is a valid construction of § 1983 is a question the Court has left unresolved. See, *e. g.*, *St. Louis* v. *Praprotnik*, *supra*, at 147 (BRENNAN, J., concurring in judgment); *Oklahoma City* v. *Tuttle*, *supra*, at 824, n. 7. Under such an approach, the outcome here would be rather clear: we would have to reverse and remand the case with instructions that judgment be entered for petitioner.[5] There can be little doubt that on its face the city's policy regarding medical treatment for detainees is constitutional. The policy states that the city jailer "shall . . . have [a person needing medical care] taken to a hospital for medical treatment, with

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[4] See, *e. g.*, *St. Louis* v. *Praprotnik*, 485 U. S. 112 (1988); *Springfield* v. *Kibbe*, 480 U. S. 257 (1987); *Los Angeles* v. *Heller*, 475 U. S. 796 (1986); *Oklahoma City* v. *Tuttle*, 471 U. S. 808 (1985).

[5] In this Court, in addition to suggesting that the city's failure to train its officers amounted to a "policy" that resulted in the denial of medical care to detainees, respondent also contended the city had a "custom" of denying medical care to those detainees suffering from emotional or mental ailments. See Brief for Respondent 31–32; Tr. of Oral Arg. 38–39. As respondent described it in her brief, and at argument, this claim of an unconstitutional "custom" appears to be little more than a restatement of her "failure-to-train as policy" claim. See *ibid.*

However, to the extent that this claim poses a distinct basis for the city's liability under § 1983, we decline to determine whether respondent's contention that such a "custom" existed is an alternative ground for affirmance. The "custom" claim was not passed on by the Court of Appeals—nor does it appear to have been presented to that court as a distinct ground for its decision. See Brief of Appellee in No. 85–3314 (CA6), pp. 4–9, 11. Thus, we will not consider it here.

permission of his supervisor . . . ." App. 33. It is difficult to see what constitutional guarantees are violated by such a policy.

Nor, without more, would a city automatically be liable under § 1983 if one of its employees happened to apply the policy in an unconstitutional manner, for liability would then rest on *respondeat superior*. The claim in this case, however, is that if a concededly valid policy is unconstitutionally applied by a municipal employee, the city is liable if the employee has not been adequately trained and the constitutional wrong has been caused by that failure to train. For reasons explained below, we conclude, as have all the Courts of Appeals that have addressed this issue,[6] that there are limited circumstances in which an allegation of a "failure to train" can be the basis for liability under § 1983. Thus, we reject petitioner's contention that only unconstitutional policies are actionable under the statute.

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[6] In addition to the Sixth Circuit decisions discussed in n. 3, *supra*, most of the other Courts of Appeals have held that a failure to train can create liability under § 1983. See, *e. g.*, *Spell* v. *McDaniel*, 824 F. 2d 1380, 1389–1391 (CA4 1987); *Haynesworth* v. *Miller*, 261 U. S. App. D. C. 66, 80–83, 820 F. 2d 1245, 1259–1262 (1987); *Warren* v. *Lincoln*, 816 F. 2d 1254, 1262–1263 (CA8 1987); *Bergquist* v. *County of Cochise*, 806 F. 2d 1364, 1369–1370 (CA9 1986); *Wierstak* v. *Heffernan*, 789 F. 2d 968, 974 (CA1 1986); *Fiacco* v. *Rensselaer*, 783 F. 2d 319, 326–327 (CA2 1986); *Gilmere* v. *Atlanta*, 774 F. 2d 1495, 1503–1504 (CA11 1985) (en banc); *Rock* v. *McCoy*, 763 F. 2d 394, 397–398 (CA10 1985); *Languirand* v. *Hayden*, 717 F. 2d 220, 227–228 (CA5 1983). Two other Courts of Appeals have stopped short of expressly embracing this rule, and have instead only implicitly endorsed it. See, *e. g.*, *Colburn* v. *Upper Darby Township*, 838 F. 2d 663, 672–673 (CA3 1988); *Lenard* v. *Argento*, 699 F. 2d 874, 885–887 (CA7 1983).

In addition, six current Members of this Court have joined opinions in the past that have (at least implicitly) endorsed this theory of liability under § 1983. See *Oklahoma City* v. *Tuttle*, *supra*, at 829–831 (BRENNAN, J., joined by MARSHALL and BLACKMUN, JJ., concurring in part and concurring in judgment); *Springfield* v. *Kibbe*, *supra*, at 268–270 (O'CONNOR, J., joined by REHNQUIST, C. J., and Powell and WHITE, JJ., dissenting).

B

Though we agree with the court below that a city can be liable under § 1983 for inadequate training of its employees, we cannot agree that the District Court's jury instructions on this issue were proper, for we conclude that the Court of Appeals provided an overly broad rule for when a municipality can be held liable under the "failure to train" theory. Unlike the question whether a municipality's failure to train employees can ever be a basis for § 1983 liability—on which the Courts of Appeals have all agreed, see n. 6, *supra*,—there is substantial division among the lower courts as to what *degree of fault* must be evidenced by the municipality's inaction before liability will be permitted.[7] We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.[8] This rule is most consistent with our ad-

[7] Some courts have held that a showing of "gross negligence" in a city's failure to train its employees is adequate to make out a claim under § 1983. See, *e. g.*, *Bergquist* v. *County of Cochise*, *supra*, at 1370; *Herrera* v. *Valentine*, 653 F. 2d 1220, 1224 (CA8 1981). But the more common rule is that a city must exhibit "deliberate indifference" towards the constitutional rights of persons in its domain before a § 1983 action for "failure to train" is permissible. See, *e. g.*, *Fiacco* v. *Rensselaer*, *supra*, at 326; *Patzner* v. *Burkett*, 779 F. 2d 1363, 1367 (CA8 1985); *Wellington* v. *Daniels*, 717 F. 2d 932, 936 (CA4 1983); *Languirand* v. *Hayden*, *supra*, at 227.

[8] The "deliberate indifference" standard we adopt for § 1983 "failure to train" claims does not turn upon the degree of fault (if any) that a plaintiff must show to make out an underlying claim of a constitutional violation. For example, this Court has never determined what degree of culpability must be shown before the particular constitutional deprivation asserted in this case—a denial of the due process right to medical care while in detention—is established. Indeed, in *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239, 243–245 (1983), we reserved decision on the question whether something less than the Eighth Amendment's "deliberate indifference" test may be applicable in claims by detainees asserting violations of their due process right to medical care while in custody.

We need not resolve here the question left open in *Revere* for two reasons. First, petitioner has conceded that, as the case comes to us, we

monition in *Monell*, 436 U. S., at 694, and *Polk County* v. *Dodson*, 454 U. S. 312, 326 (1981), that a municipality can be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation." Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983. As JUSTICE BRENNAN's opinion in *Pembaur* v. *Cincinnati*, 475 U. S. 469, 483–484 (1986) (plurality) put it: "[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers. See also *Oklahoma City* v. *Tuttle*, 471 U. S., at 823 (opinion of REHNQUIST, J.). Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality—a "policy" as defined by our prior cases—can a city be liable for such a failure under § 1983.

Monell's rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible.[9] That much

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must assume that respondent's constitutional right to receive medical care was denied by city employees—whatever the nature of that right might be. See Tr. of Oral Arg. 8–9. Second, the proper standard for determining when a municipality will be liable under § 1983 for constitutional wrongs does not turn on any underlying culpability test that determines when such wrongs have occurred. Cf. Brief for Respondent 27.

[9] The plurality opinion in *Tuttle* explained why this must be so:

"Obviously, if one retreats far enough from a constitutional violation some municipal 'policy' can be identified behind almost any . . . harm inflicted by a municipal official; for example, [a police officer] would never have killed Tuttle if Oklahoma City did not have a 'policy' of establishing a police force. But *Monell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory

may be true. The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.[10] In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.[11]

In resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform. That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may

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that a particular violation was 'caused' by the municipal 'policy.'" 471 U. S., at 823. Cf. also *id.*, at 833, n. 9 (opinion of BRENNAN, J.).

[10] For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee* v. *Garner*, 471 U. S. 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

[11] The record indicates that city did train its officers and that its training included first-aid instruction. See App. to Pet. for Cert. 4a. Petitioner argues that it could not have been obvious to the city that such training was insufficient to administer the written policy, which was itself constitutional. This is a question to be resolved on remand. See Part IV, *infra*.

have resulted from factors other than a faulty training program. See *Springfield* v. *Kibbe*, 480 U. S., at 268 (O'CONNOR, J., dissenting); *Oklahoma City* v. *Tuttle*, *supra*, at 821 (opinion of REHNQUIST, J.). It may be, for example, that an otherwise sound program has occasionally been negligently administered. Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

Moreover, for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury. Thus in the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs.[12] Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances. But judge and jury, doing their respective jobs, will be adequate to the task.

To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983.

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[12] Respondent conceded as much at argument. See Tr. of Oral Arg. 50–51; cf. also *Oklahoma City* v. *Tuttle*, *supra*, at 831 (opinion of BRENNAN, J.).

In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. See *Oklahoma City* v. *Tuttle*, 471 U. S., at 823 (opinion of REHNQUIST, J.). Thus, permitting cases against cities for their "failure to train" employees to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities—a result we rejected in *Monell*, 436 U. S., at 693–694. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill suited to undertake, as well as one that would implicate serious questions of federalism. Cf. *Rizzo* v. *Goode*, 423 U. S. 362, 378–380 (1976).

Consequently, while claims such as respondent's—alleging that the city's failure to provide training to municipal employees resulted in the constitutional deprivation she suffered—are cognizable under § 1983, they can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.

IV

The final question here is whether this case should be remanded for a new trial, or whether, as petitioner suggests, we should conclude that there are no possible grounds on which respondent can prevail. See Tr. of Oral Arg. 57–58. It is true that the evidence in the record now does not meet the standard of § 1983 liability we have set forth above. But, the standard of proof the District Court ultimately imposed on respondent (which was consistent with Sixth Circuit precedent) was a lesser one than the one we adopt today, see Tr. 4–389—4–390. Whether respondent should have an opportunity to prove her case under the "deliberate indifference" rule we have adopted is a matter for the Court of Appeals to deal with on remand.

V

Consequently, for the reasons given above, we vacate the judgment of the Court of Appeals and remand this case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, concurring.

The Court's opinion, which I join, makes clear that the Court of Appeals is free to remand this case for a new trial.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, concurring in part and dissenting in part.

I join Parts I and II and all of Part III of the Court's opinion except footnote 11, see *ante*, at 390, n. 11. I thus agree that where municipal policymakers are confronted with an obvious need to train city personnel to avoid the violation of constitutional rights and they are deliberately indifferent to that need, the lack of necessary training may be appropriately considered a city "policy" subjecting the city itself to liability under our decision in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978). As the Court observes, "[o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under [42 U. S. C.] § 1983." *Ante*, at 389. I further agree that a § 1983 plaintiff pressing a "failure to train" claim must prove that the lack of training was the "cause" of the constitutional injury at issue and that this entails more than simply showing "but for" causation. *Ante*, at 392. Lesser requirements of fault and causation in this context would "open municipalities to unprecedented liability under § 1983," *ante*, at 391, and would pose serious federalism concerns. *Ante*, at 392.

My single point of disagreement with the majority is thus a small one. Because I believe, as the majority strongly hints,

see *ibid.*, that respondent has not and could not satisfy the fault and causation requirements we adopt today, I think it unnecessary to remand this case to the Court of Appeals for further proceedings. This case comes to us after a full trial during which respondent vigorously pursued numerous theories of municipal liability including an allegation that the city had a "custom" of not providing medical care to detainees suffering from emotional illnesses. Respondent thus had every opportunity and incentive to adduce the type of proof necessary to satisfy the deliberate indifference standard we adopt today. Rather than remand in this context, I would apply the deliberate indifference standard to the facts of this case. After undertaking that analysis below, I conclude that there is no evidence in the record indicating that the city of Canton has been deliberately indifferent to the constitutional rights of pretrial detainees.

I

In *Monell*, the Court held that municipal liability can be imposed under § 1983 only where the municipality, as an entity, can be said to be "responsible" for a constitutional violation committed by one of its employees. "[T]he touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution." 436 U. S., at 690. The Court found that the language of § 1983, and rejection of the "Sherman Amendment" by the 42d Congress, were both strong indicators that the framers of the Civil Rights Act of 1871 did not intend that municipal governments be held vicariously liable for the constitutional torts of their employees. Thus a § 1983 plaintiff seeking to attach liability to the city for the acts of one of its employees may not rest on the employment relationship alone; both fault and causation *as to the acts or omissions of the city itself* must be proved. The Court reaffirms these requirements today.

Where, as here, a claim of municipal liability is predicated upon a failure to act, the requisite degree of fault must be

shown by proof of a background of events and circumstances which establish that the "policy of inaction" is the functional equivalent of a decision by the city itself to violate the Constitution. Without some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault. Moreover, absent a requirement that the lack of training at issue bear a very close causal connection to the violation of constitutional rights, the failure to train theory of municipal liability could impose "prophylactic" duties on municipal governments only remotely connected to underlying constitutional requirements themselves.

Such results would be directly contrary to the intent of the drafters of § 1983. The central vice of the Sherman Amendment, as noted by the Court's opinion in *Monell*, was that it "impose[d] a species of vicarious liability on municipalities since it could be construed to impose liability even if the municipality *did not know* of an impending or ensuing riot or did not have the wherewithal to do anything about it." 436 U. S., at 692, n. 57 (emphasis added). Moreover, as noted in *Monell*, the authors of § 1 of the Ku Klux Act did not intend to create any new rights or duties beyond those contained in the Constitution. *Id.*, at 684–685. Thus, § 1 was referred to as "reenacting the Constitution." Cong. Globe, 42d Cong., 1st Sess., 569 (1871) (Rep. Edmunds). Representative Bingham, the author of § 1 of the Fourteenth Amendment, saw the purpose of § 1983 as "the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic . . . to the extent of the rights guaranteed to him by the Constitution." *Id.*, at App. 81. See also *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 617 (1979) ("[Section] 1 of the Civil Rights Act of 1871 did not provide for any substantive rights—equal or otherwise. As introduced and enacted, it served only to insure that an individual had a cause of action for violations of the Constitu-

tion"). Thus § 1983 is not a "federal good government act" for municipalities. Rather it creates a federal cause of action against persons, including municipalities, who deprive citizens of the United States of their constitutional rights.

Sensitive to these concerns, the Court's opinion correctly requires a high degree of fault on the part of city officials before an omission that is not in itself unconstitutional can support liability as a municipal policy under *Monell*. As the Court indicates, "it may happen that . . . the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Ante*, at 390. Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied. Only then can it be said that the municipality has made "'a deliberate choice to follow a course of action . . . from among various alternatives.'" *Ante*, at 389, quoting *Pembaur* v. *Cincinnati*, 475 U. S. 469, 483–484 (1986).

In my view, it could be shown that the need for training was obvious in one of two ways. First, a municipality could fail to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face. As the majority notes, see *ante*, at 390, n. 10, the constitutional limitations established by this Court on the use of deadly force by police officers present one such situation. The constitutional duty of the individual officer is clear, and it is equally clear that failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue.

The claim in this case—that police officers were inadequately trained in diagnosing the symptoms of emotional illness—falls far short of the kind of "obvious" need for training

that would support a finding of deliberate indifference to constitutional rights on the part of the city. As the Court's opinion observes, *ante*, at 388–389, n. 8, this Court has not yet addressed the precise nature of the obligations that the Due Process Clause places upon the police to seek medical care for pretrial detainees who have been *physically* injured while being apprehended by the police. See *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239, 246 (1983) (REHNQUIST, J., concurring). There are thus no clear constitutional guideposts for municipalities in this area, and the diagnosis of mental illness is not one of the "usual and recurring situations with which [the police] must deal." *Ante*, at 391. The lack of training at issue here is not the kind of omission that can be characterized, in and of itself, as a "deliberate indifference" to constitutional rights.

Second, I think municipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements. The lower courts that have applied the "deliberate indifference" standard we adopt today have required a showing of a pattern of violations from which a kind of "tacit authorization" by city policymakers can be inferred. See, *e. g.*, *Fiacco* v. *Rensselaer*, 783 F. 2d 319, 327 (CA2 1986) (multiple incidents required for finding of deliberate indifference); *Patzner* v. *Burkett*, 779 F. 2d 1363, 1367 (CA8 1985) ("[A] municipality may be liable if it had notice of prior misbehavior by its officers and failed to take remedial steps amounting to deliberate indifference to the offensive acts"); *Languirand* v. *Hayden*, 717 F. 2d 220, 227–228 (CA5 1983) (municipal liability for failure to train requires "evidence at least of a pattern of similar

incidents in which citizens were injured or endangered"); *Wellington* v. *Daniels*, 717 F. 2d 932, 936 (CA4 1983) ("[A] failure to supervise gives rise to § 1983 liability, however, only in those situations where there is a history of widespread abuse. Only then may knowledge be imputed to the supervisory personnel").

The Court's opinion recognizes this requirement, see *ante*, at 390, and n. 10, but declines to evaluate the evidence presented in this case in light of the new legal standard. *Ante*, at 392. From the outset of this litigation, respondent has pressed a claim that the city of Canton had a custom of denying medical care to pretrial detainees with emotional disorders. See Amended Complaint ¶ 28, App. 27. Indeed, up to and including oral argument before this Court, counsel for respondent continued to assert that respondent was attempting to hinge municipal liability upon "both a custom of denying medical care to a certain class of prisoners, and a failure to train police that led to this particular violation." Tr. of Oral Arg. 37–38. At the time respondent filed her complaint in 1980, it was clear that proof of the existence of a custom entailed a showing of "practices . . . so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 168 (1970); see also *Garner* v. *Memphis Police Department*, 600 F. 2d 52, 54–55, and n. 4 (CA6 1979) (discussing proof of custom in light of *Monell*).

Whatever the prevailing standard at the time concerning liability for failure to train, respondent thus had every incentive to adduce proof at trial of a pattern of violations to support her claim that the city had an unwritten custom of denying medical care to emotionally ill detainees. In fact, respondent presented no testimony from any witness indicating that there had been past incidents of "deliberate indifference" to the medical needs of emotionally disturbed detainees or that any other circumstance had put the city on actual or constructive notice of a need for additional training in this

regard. At trial, David Maser, who was Chief of Police of the city of Canton from 1971 to 1980, testified without contradiction that during his tenure he received no complaints that detainees in the Canton jails were not being accorded proper medical treatment. Tr. 4–347—4–348. Former Officer Cherry, who had served as a jailer for the Canton Police Department, indicated that he had never had to seek medical treatment for persons who were emotionally upset at the prospect of arrest, because they usually calmed down when a member of the department spoke with them or one of their family members arrived. *Id.*, at 4–83—4–84. There is quite simply nothing in this record to indicate that the city of Canton had any reason to suspect that failing to provide this kind of training would lead to injuries of any kind, let alone violations of the Due Process Clause. None of the Courts of Appeals that already apply the standard we adopt today would allow respondent to take her claim to a jury based on the facts she adduced at trial. See *Patzner* v. *Burkett*, *supra*, at 1367 (summary judgment proper under "deliberate indifference" standard where evidence of only single incident adduced); *Languirand* v. *Hayden*, *supra*, at 229 (reversing jury verdict rendered under failure to train theory where there was no evidence of prior incidents to support a finding that municipal policymakers were "consciously indifferent" to constitutional rights); *Wellington* v. *Daniels*, *supra*, at 937 (affirming judgment notwithstanding verdict for municipality under "deliberate indifference" standard where evidence of only a single incident was presented at trial); cf. *Fiacco* v. *Rensselaer*, *supra*, at 328–332 (finding evidence of "deliberate indifference" sufficient to support jury verdict where a pattern of similar violations was shown at trial).

Allowing an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of *Monell*. "To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy,

would amount to permitting precisely the theory of strict *respondeat superior* liability rejected in *Monell*." *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 831 (1985) (BRENNAN, J., concurring in part and concurring in judgment). As the authors of the Ku Klux Act themselves realized, the resources of local government are not inexhaustible. The grave step of shifting those resources to particular areas where constitutional violations are likely to result through the deterrent power of § 1983 should certainly not be taken on the basis of an isolated incident. If § 1983 and the Constitution require the city of Canton to provide detailed medical and psychological training to its police officers, or to station paramedics at its jails, other city services will necessarily suffer, including those with far more direct implications for the protection of constitutional rights. Because respondent's evidence falls far short of establishing the high degree of fault on the part of the city required by our decision today, and because there is no indication that respondent could produce any new proof in this regard, I would reverse the judgment of the Court of Appeals and order entry of judgment for the city.

DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* ADAMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87–121. Argued November 1, 1988—Decided February 28, 1989

At the start of jury selection for respondent's Florida state-court trial for first-degree murder, the trial judge instructed the prospective jurors on their responsibility for the sentence they would recommend, stating that the court, not the jury, was responsible for sentencing and that the jury had merely an advisory role. Defense counsel did not object to these instructions. The jury found respondent guilty and recommended the death sentence, which the trial judge then imposed. The Florida Supreme Court affirmed the conviction and sentence on direct appeal in which respondent did not allege as error, on either state or federal grounds, the above instructions. Nor did he so allege in a subsequent unsuccessful motion in state court for postconviction relief or in a later unsuccessful federal habeas corpus petition. Thereafter, it was held in *Caldwell* v. *Mississippi*, 472 U. S. 320, that the prosecutor's remarks that misinformed the jury in a capital case as to the role of appellate review violated the Eighth Amendment. Based on *Caldwell*, respondent filed another motion in state court for postconviction relief, challenging for the first time the instructions in question and arguing that they violated the Eighth Amendment by misinforming the jury of its sentencing role under Florida law because the Florida Supreme Court in another case had held that a trial judge could override the jury's recommended sentence only if the facts were "so clear and convincing that virtually no reasonable person could differ," and that therefore, since the trial judge in this case had told the jurors that the sentencing responsibility was solely his and failed to tell them that he could override their verdict only under limited circumstances, the judge misled the jury in violation of *Caldwell*. On appeal, the Florida Supreme Court refused to address this argument because respondent had failed to raise it on direct appeal. The *Caldwell* claim was then raised in respondent's second federal habeas petition, and the District Court held that the claim was procedurally barred. The Court of Appeals reversed, holding that the claim was so novel at the time of respondent's trial, sentencing, and appeal that its legal basis was not reasonably available and that therefore he had established cause for his procedural default. The court then proceeded to hold that the instructions in question violated the Eighth Amendment.

Held: *Caldwell* does not provide cause for respondent's procedural default. Despite the availability of a claim that the instructions in question violated state law, respondent did not object to them at trial or challenge them on appeal. As a result, Florida law barred him from raising the issue in later state proceedings. Respondent offered no excuse for his failure to challenge the instructions on state-law grounds, and there is none that would amount to good cause in a federal habeas proceeding. What is determinative in this case is that the ground for challenging the instructions—that they were objectionable under state law—was a necessary element of the subsequently available *Caldwell* claim. In such a case, the subsequently available federal claim did not excuse the procedural default. *Reed* v. *Ross*, 468 U. S. 1, distinguished. Pp. 405–410.

804 F. 2d 1526, and 816 F. 2d 1493, reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 412.

Margene A. Roper, Assistant Attorney General of Florida, argued the cause for petitioners. With her on the brief was *Robert A. Butterworth*, Attorney General.

Ronald J. Tabak argued the cause for respondent. With him on the brief were *Larry Helm Spalding* and *Mark Olive*.*

JUSTICE WHITE delivered the opinion of the Court.

In this case we decide whether our decision in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), provided cause for respondent's failure to challenge the trial court's instructions in accordance with state procedures.

Respondent Aubrey Dennis Adams, Jr., was charged with the first-degree murder of 8-year-old Trisa Gail Thornley, and the State sought to impose the death penalty. At the start of jury selection for respondent's trial, the trial judge

**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Michael Mello and *Susan Apel* filed a brief for the National Legal Aid and Defender Association et al. as *amici curiae*.

undertook to instruct the prospective jurors on their "advisory" role under Florida law.[1] The judge informed the initial panel of prospective jurors:

> "The Court is not bound by your recommendation. The ultimate responsibility for what this man gets is not on your shoulders. It's on my shoulders. You are merely an advisory group to me in Phase Two. You can come back and say, Judge, we think you ought to give the man life. I can say, I disregard the recommendation of the Jury and I give him death. You can come back and say, Judge, we think he ought to be put to death. I can say, I disregard your recommendation and give him life. So that this conscience part of it as to whether or not you're going to put the man to death or not, that is not your decision to make. That's only my decision to make and it has to be on my conscience. It cannot be on yours." App. 19–20.

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[1] Florida Stat. § 921.141 (1985) provides in relevant part as follows:

"(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

"(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

"(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

"(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

"(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

"(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

"(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

The judge had intended to give this explanation to the entire venire before beginning the selection process but forgot to do so, and so he gave a similar explanation each time new prospective jurors were seated. As a result, each of the jurors ultimately selected heard the explanation at least once, and several heard it a number of times. In addition, the judge interrupted counsel's *voir dire* on two occasions to repeat that the court, not the jury, was responsible for sentencing, and again instructed the jury to that effect before it began its deliberations. Defense counsel did not object at any point to these instructions.

On October 20, 1978, the jury found respondent guilty of first-degree murder. After a separate sentencing hearing, the jury recommended that he be sentenced to death, and the trial judge imposed a death sentence.[2] The Florida Supreme Court affirmed respondent's conviction and sentence on direct appeal, *Adams* v. *State*, 412 So. 2d 850 (1982), and this Court denied certiorari, 459 U. S. 882 (1982). Respondent did not allege as error, on either state or federal grounds, the trial judge's instructions to the jurors on their responsibility for the sentence they would recommend.

In September 1984, the Florida Supreme Court affirmed the denial of respondent's first motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. *Adams* v. *State*, 456 So. 2d 888. Again, respondent did not challenge the trial judge's statements to the jurors on their responsibility for the death sentence. Respondent next filed his first federal habeas petition in District Court; once again he did not challenge the trial judge's instructions. The Dis-

[2] As aggravating circumstances, the trial judge found that the murder was committed while respondent was engaged in or attempting kidnaping and rape, was committed to avoid arrest, and was especially heinous, atrocious, or cruel. As mitigating circumstances, the trial judge found that respondent had no significant history of prior criminal activity, was under the influence of extreme emotional or mental disturbance at the time of the murder because he and his wife were getting a divorce, and was only 20 years of age.

trict Court denied his habeas petition on September 18, 1984, *Adams* v. *Wainwright*, No. 84–170—Civ–Oc–16 (MD Fla.), the Eleventh Circuit affirmed, 764 F. 2d 1356 (1985), and this Court denied certiorari, 474 U. S. 1073 (1986).

On June 11, 1985, *Caldwell* v. *Mississippi*, 472 U. S. 320, was decided. The Court there held that remarks by the prosecutor in a capital case that misinformed the jury as to the role of appellate review violated the Eighth Amendment. *Id.*, at 336 (plurality opinion); *id.*, at 341–342 (O'CONNOR, J., concurring in part and concurring in judgment). Based on *Caldwell*, respondent filed a second motion for postconviction relief under Florida Rule 3.850, challenging for the first time the trial judge's statements to the jurors that they were not responsible for the sentence they recommended and arguing that the judge's instructions violated the Eighth Amendment by misinforming the jury of its role under Florida law. According to respondent, although the Florida death penalty statute provided that the jury's recommendation was only advisory, the Florida Supreme Court had held that a trial judge could only override the jury's verdict if the facts were "so clear and convincing that virtually no reasonable person could differ." *Tedder* v. *State*, 322 So. 2d 908, 910 (1975) *(per curiam)*. Since the trial judge in this case told the jurors that the sentencing responsibility was solely his and failed to tell them that he could override their verdict only under limited circumstances, respondent argued, the judge misled the jury in violation of *Caldwell*. The Florida Supreme Court refused to address respondent's argument on the merits, however, because respondent had failed to raise the argument on direct appeal. *Adams* v. *State*, 484 So. 2d 1216, 1217, cert. denied, 475 U. S. 1103 (1986).

The *Caldwell* claim was then raised in respondent's second federal habeas petition. The District Court held that the claim was procedurally barred, and that, alternatively, respondent's *Caldwell* claim was meritless. *Adams* v. *Wainwright*, No. 86–64—Civ–Oc–16 (MD Fla., Mar. 7, 1986), p. 9,

App. to Pet. for Cert. A–43, A–56—A–60. The Eleventh Circuit reversed. *Adams* v. *Wainwright*, 804 F. 2d 1526 (1986), modified on denial of rehearing, 816 F. 2d 1493 (1987). The Court of Appeals held that respondent's *Caldwell* claim "was so novel at the time of [his] trial in October 1978 and his sentencing and appeal in early 1979 that its legal basis was not reasonably available at that time"; therefore, he had established cause for his procedural default. 816 F. 2d, at 1498. The court proceeded to address the merits of respondent's *Caldwell* claim, concluding that the trial judge's instructions violated the Eighth Amendment. 804 F. 2d, at 1532–1533.

We granted certiorari to review the Eleventh Circuit's holding that *Caldwell* provides cause for respondent's procedural default,[3] 485 U. S. 933 (1988), and we now reverse.

In *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977), this Court required that habeas petitioners show "cause" and "prejudice" before federal courts will review claims that the state courts have found procedurally defaulted. We have reaffirmed this requirement on several occasions. See *Murray* v. *Carrier*, 477 U. S. 478, 494–495 (1986); *Engle* v. *Isaac*, 456 U. S. 107, 129 (1982). We have, however, "left open 'for

[3] Shortly after the Eleventh Circuit's decision in this case, the Tenth Circuit also held that *Caldwell* was sufficiently novel to provide cause for a procedural default. *Dutton* v. *Brown*, 812 F. 2d 593, 596 (en banc) (finding cause for procedural default because "[t]he law petitioner relies on did not become established until the *Caldwell* decision in 1985"), cert. denied, 484 U. S. 836 (1987). Previously, however, the Fifth Circuit had held in *Moore* v. *Blackburn*, 774 F. 2d 97 (1985) (alternative holding), cert. denied, 476 U. S. 1176 (1986), that the failure to raise a *Caldwell* claim in a prior habeas petition was an abuse of the writ, see 28 U. S. C. § 2254 Rule 9(b). According to the Court of Appeals, "[t]hat a competent attorney should have been aware of this claim is apparent from the Supreme Court's *Caldwell* opinion." 774 F. 2d, at 98.

Although petitioners allege in their brief that respondent's failure to raise a *Caldwell* claim in his first federal habeas petition constitutes an abuse of the writ, we need not address this contention given our resolution of the case on procedural bar grounds.

resolution in future decisions the precise definition'" of cause and prejudice. *Amadeo* v. *Zant*, 486 U. S. 214, 221 (1988) (quoting *Sykes*, *supra*, at 87). See also *Reed* v. *Ross*, 468 U. S. 1, 13 (1984).

Reed v. *Ross* held that one way a petitioner can establish cause is by showing that "a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Id.*, at 16. The Eleventh Circuit, relying on *Reed*, held in this case that "Eighth Amendment jurisprudence at the time of [respondent's] procedural default did not provide a reasonable basis" on which to raise a *Caldwell* claim. 816 F. 2d, at 1499. The Court of Appeals reviewed our prior cases and concluded that none of them indicated that statements such as the ones made by the trial judge here "implicated the Eighth Amendment prohibition against cruel and unusual punishment." *Ibid.* The Court also noted that it could find no decisions by other courts suggesting that "this type of Eighth Amendment claim was being raised at that time." *Ibid.*

We believe that the Eleventh Circuit failed to give sufficient weight to a critical fact that leads us to conclude, without passing on the Court of Appeals' historical analysis, that *Caldwell* does not provide cause for respondent's procedural default. As we have noted, the decision in "*Caldwell* is relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision." *Darden* v. *Wainwright*, 477 U. S. 168, 184, n. 15 (1986). As respondent conceded at oral argument, if the challenged instructions accurately described the role of the jury under state law, there is no basis for a *Caldwell* claim. To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law. See, *e. g.*, Tr. of Oral Arg. 29, 32, 33, and 36–37. Respondent therefore must be asserting in this case that the trial court's re-

marks violated state law, and in finding a *Caldwell* violation in this case, the Court of Appeals must have concluded that the remarks in question were error under Florida law.[4]

If respondent and the Court of Appeals are correct in this regard, respondent plainly had the basis for an objection and an argument on appeal that the instructions violated state law. See *Pait* v. *State*, 112 So. 2d 380, 383–384 (Fla. 1959) (holding that misinforming the jury of its role constitutes reversible error); *Blackwell* v. *State*, 79 So. 731, 735–736 (Fla. 1918) (same).[5] Yet, despite the availability of this claim under state law, respondent did not object to the remarks at trial or challenge them on appeal. As a result, Florida law bars respondent from raising the issue in later state proceedings. See, *e. g.*, *Adams*, 484 So. 2d, at 1217.

Respondent offers no excuse for his failure to challenge the remarks on state-law grounds, and we discern none that would amount to good cause in a federal habeas corpus proceeding. Had respondent objected at the time and asserted error under state law, and had the trial or appellate court sustained his objection, the error would have been corrected in the state system. Had his objection been overruled and that ruling sustained on appeal, we would very likely know that the instruction was an accurate reflection of state law. In either event, it is doubtful that the later decision in *Caldwell* would have provoked the filing of a second habeas corpus petition. In these circumstances, the fact that it turns out that the trial court's remarks were objectionable on federal as well as state grounds is not good cause for his failure to follow Florida procedural rules.

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[4] We do not decide whether in fact the jury as instructed in this case was misinformed of its role under Florida law. The petition for certiorari did not raise this issue, and the merit of respondent's *Caldwell* claim is irrelevant to our disposition of the case.

[5] Both of these cases were cited in *Caldwell* v. *Mississippi*, 472 U. S. 320, 334, n. 5 (1985), as support for the decision in that case.

Reed v. *Ross* is of no help to respondent. In that case, the defendant failed to challenge on appeal an instruction that was plainly valid under the settled law of the State. Six years later, it was held in *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), that such an instruction violated the Due Process Clause of the Federal Constitution. We held that there was a good cause for the procedural default because a challenge to the instruction was "so novel that its legal basis [was] not reasonably available to counsel." 468 U. S., at 16. Hence, there was no reason for suspecting that defense counsel was flouting state procedures for tactical or other reasons. But here respondent claims that the court's remarks were invalid under state law at the time; yet those remarks were not objected to nor were they challenged on appeal. Unlike *Reed*, the legal basis for a challenge was plainly available, and it would not be safe to assume that the failure to object was not for tactical or other reasons that will not excuse the default in a habeas corpus proceeding. Indeed, at the time of respondent's trial there was some suggestion that comments such as those by the trial judge would incline the jury toward leniency rather than toward recommending a death sentence. See *Dobbert* v. *Florida*, 432 U. S. 282, 294, and n. 7 (1977). Furthermore, because in *Reed* the legal basis for the claim at issue was so lacking, it could not be said that adjudicating the claim in federal court would infringe on the interest of the state courts in enforcing their procedural rules. But here, as we have said, the State has every interest in having the defendant challenge a faulty instruction in a timely manner so that it can correct the misstatement, and that interest does not disappear when it is later held that the instruction violates the Federal Constitution if it erroneously describes the role of the jury under state law.

We agree with respondent and the Court of Appeals that the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution. See 816 F. 2d, at 1499, n. 6. It is clear that

"mere errors of state law are not the concern of this Court unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." *Barclay* v. *Florida*, 463 U. S. 939, 957–958 (1983) (plurality opinion) (citation omitted). But the issue in this case is not whether respondent could have obtained federal habeas relief at the time of his trial for the trial judge's instructions. Rather, the issue is whether we should exercise our equitable power to overlook respondent's state procedural default. *Reed*, 468 U. S., at 9.

Neither do we hold that whenever a defendant has any basis for challenging particular conduct as improper, a failure to preserve that claim under state procedural law bars any subsequently available claim arising out of the same conduct. Indeed, respondent here could have challenged the improper remarks by the trial judge at the time of his trial as a violation of due process. See *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974). Rather, what is determinative in this case is that the ground for challenging the trial judge's instructions—that they were objectionable under state law—was a necessary element of the subsequently available *Caldwell* claim. In such a case, the subsequently available federal claim does not excuse the procedural default.[6]

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[6] Respondent asserts, as an alternative basis for upholding the judgment of the Court of Appeals, that the procedural bar on which the Florida Supreme Court relied is not "adequate"—that is, it has not been "consistently or regularly applied." *Johnson* v. *Mississippi*, 486 U. S. 578, 589 (1988). The Eleventh Circuit stated that "[i]t is doubtful . . . that an adequate and independent state-law ground is present in this case," 816 F. 2d 1493, 1497 (1987), but went on to find that respondent had established cause and prejudice for his default.

First, respondent argues that under Florida law, claims based on major changes in constitutional law that occur after a defendant's direct appeal are cognizable in a Rule 3.850 proceeding. Respondent contends that, in the words of the Eleventh Circuit, his "*Caldwell* claim is the very type of claim for which Florida created the Rule 3.850 procedure." *Ibid.* But, given our conclusion that *Caldwell* does not excuse respondent's proce-

The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

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dural default, we can hardly fault the Florida Supreme Court for reaching a similar conclusion under its own procedural rules.

Second, respondent asserts, and the dissent agrees, that the Florida Supreme Court has failed to apply its procedural rule consistently and regularly because it has addressed the merits in several cases raising *Caldwell* claims on postconviction review. In the vast majority of cases, however, the Florida Supreme Court has faithfully applied its rule that claims not raised on direct appeal cannot be raised on postconviction review. See *Bertolotti* v. *State*, 534 So. 2d 386, 387, n. 2 (1988); *Clark* v. *State*, 533 So. 2d 1144, 1145 (1988); *Jones* v. *Dugger*, 533 So. 2d 290, 292 (1988); *Woods* v. *State*, 531 So. 2d 79, 83 (1988); *Cave* v. *State*, 529 So. 2d 293, 296 (1988); *Preston* v. *State*, 528 So. 2d 896, 899 (1988); *Doyle* v. *State*, 526 So. 2d 909, 911 (1988); *Ford* v. *State*, 522 So. 2d 345, 346 (1988), cert. pending No. 88–5582; *Henderson* v. *Dugger*, 522 So. 2d 835, 836, n. (1988); *Tafero* v. *Dugger*, 520 So. 2d 287, 289 (1988); *Foster* v. *State*, 518 So. 2d 901, 901–902 (1987), cert. denied, 487 U. S. 1240 (1988); *Phillips* v. *Dugger*, 515 So. 2d 227, 227–228 (1987); *Copeland* v. *Wainwright*, 505 So. 2d 425, 427–428, vacated on other grounds, 484 U. S. 807 (1987); *Aldridge* v. *State*, 503 So. 2d 1257, 1259 (1987); *State* v. *Sireci*, 502 So. 2d 1221, 1223–1224 (1987); *Adams* v. *State*, 484 So. 2d 1216, 1217, cert. denied, 475 U. S. 1103 (1986); *Middleton* v. *State*, 465 So. 2d 1218, 1226 (1985).

Moreover, the few cases that respondent and the dissent cite as ignoring procedural defaults do not convince us that the Florida Supreme Court fails to apply its procedural rule regularly and consistently. In *Darden* v. *State*, 475 So. 2d 217, 218 (1985), the only alleged default discussed by the court involved the failure to raise the *Caldwell* claim in a prior Rule 3.850 proceeding. In *Mann* v. *State*, 482 So. 2d 1360, 1362 (1986) (as construed in *Mann* v. *Dugger*, 844 F. 2d 1446, 1448, n. 4 (CA11 1988), cert. pending, No. 87–2073), the court did not even expressly mention the defendant's *Caldwell* claim. In *Combs* v. *State*, 525 So. 2d 853, 856 (1988), the Florida court noted that "[i]n *Caldwell*, unlike the instant case, the defendant had objected to the Mississippi prosecutor's comment," while in *Daugherty* v. *State*, 533 So. 2d 287, 288, cert. denied, 488 U. S. 959 (1988), the court merely relied on *Combs*. Finally, in *Glock* v. *Dugger*, 537 So. 2d 99, 102 (1989), the court merely stated that "the trial court was justified in summarily denying relief" on the petitioner's 16 claims; it is not clear from the opinion whether the trial court held that the *Caldwell* claim was or was not procedurally barred. Regardless of whether any of these cases might

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

Although this Court repeatedly has ruled that the Eighth Amendment prohibits the arbitrary or capricious imposition of the death penalty,[1] the Court today itself arbitrarily im-

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be subject to federal habeas review because of the lack of a plain statement that the decision was based on state-law grounds, an issue we considered in *Harris* v. *Reed*, *ante*, p. 255, we do not believe that they are sufficient to undercut the adequacy of the Florida procedural rule.

Respondent also argues that we should overlook his procedural default because failing to do so would result in a "fundamental miscarriage of justice." We disagree. In *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986), this Court stated that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." We made clear, however, that such a case would be an "extraordinary" one, *ibid.*, and have since recognized the difficulty of translating the concept of "actual" innocence from the guilt phase to the sentencing phase of a capital trial, *Smith* v. *Murray*, 477 U. S. 527, 537 (1986). We do not undertake here to define what it means to be "actually innocent" of a death sentence. But it is clear to us that the fact that the trial judge in this case found an equal number of aggravating and mitigating circumstances is not sufficient to show that an alleged error in instructing the jury on sentencing resulted in a fundamental miscarriage of justice.

The dissent "assume[s], *arguendo*," that a fundamental miscarriage of justice results whenever "there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision." *Post*, at 415, n. 4. According to the dissent, since "the very essence of a *Caldwell* claim is that the accuracy of the sentencing determination has been unconstitutionally undermined," *post*, at 423, the standard for showing a fundamental miscarriage of justice necessarily is satisfied. We reject this overbroad view. Demonstrating that an error is by its nature the kind of error that might have affected the accuracy of a death sentence is far from demonstrating that an individual defendant probably is "actually innocent" of the sentence he or she received. The approach taken by the dissent would turn the case in which an error results in a fundamental miscarriage of justice, the "extraordinary case," *Carrier*, *supra*, at 496, into an all too ordinary one.

[1] *E. g.*, *Johnson* v. *Mississippi*, 486 U. S. 578, 585–587 (1988); *Maynard* v. *Cartwright*, 486 U. S. 356, 362–363 (1988); *Booth* v. *Maryland*, 482

poses procedural obstacles to thwart the vindication of what apparently is a meritorious Eighth Amendment claim.

In this case, the Eleventh Circuit determined that respondent Aubrey Dennis Adams was sentenced to death in violation of the Eighth Amendment, as interpreted in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985).[2] This Court now reverses that determination, not because it finds the death sentence valid, but because respondent was late in presenting his claim to the Florida courts. In other words, this Court is sending a man to a presumptively unlawful execution because he or his lawyers did not raise his objection at what is felt to be the appropriate time for doing so.

I would understand, and accept, the Court's decision if the federal courts lacked authority to remedy the unconstitutional death sentence. But, manifestly, that is not the case. In reversing the judgment of the Court of Appeals, the majority relegates to a footnote its discussion of established doctrines that, upon full consideration, might entitle respondent to an affirmance, not a reversal, of that judgment. Thus, the majority not only capriciously casts aside precedent to reinstate an unconstitutionally "unreliable"[3] death sentence

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U. S. 496, 509 (1987); *California* v. *Ramos*, 463 U. S. 992, 999 (1983); *Zant* v. *Stephens*, 462 U. S. 862, 874 (1983).

[2] In *Caldwell*, this Court ruled that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U. S., at 328–329.

[3] See *Adams* v. *Wainwright*, 804 F. 2d 1526, 1533 (CA11 1986); 816 F. 2d 1493, 1501 (CA11 1987) (case below). The Eleventh Circuit, in a subsequent case heard en banc, had occasion to express unanimous approval of the panel decision here that respondent's *Caldwell* claim is meritorious—even as the en banc Eleventh Circuit divided sharply over the validity of *Caldwell* claims brought by other prisoners on weaker factual records. See *Harich* v. *Dugger*, 844 F. 2d 1464, 1473 (1988), cert. pending, No. 88–5216. Moreover, in the instant case, petitioners did not even seek review of the Court of Appeals' determination, under *Caldwell*, that respondent's death sentence violated the Eighth Amendment. See *ante*, at 408, n. 4.

purely for procedural reasons, but also compounds that capriciousness by issuing an opinion in which decisive issues receive only dismissive consideration. Given this treatment of the case, it is worth reflecting for a moment on the special inappropriateness and cruelty of the impending execution.

I

There is no need to dwell upon the history of the Court's decisions on whether a criminal defendant's failure to comply with a rule of state procedure precludes review of his conviction or sentence in a subsequent federal habeas corpus proceeding. By now it is settled that an adequate and independent state procedural ground, which would have precluded direct review in this Court, bars habeas review unless the habeas petitioner can demonstrate "cause" for the procedural default and "prejudice" resulting from the alleged constitutional violation. *Wainwright* v. *Sykes*, 433 U. S. 72, 84, 87, 90–91 (1977).

Since *Sykes*, the Court has refined the "cause" and "prejudice" standard, see, *e. g.*, *Reed* v. *Ross*, 468 U. S. 1 (1984); *Engle* v. *Isaac*, 456 U. S. 107 (1982), and also has held that habeas review of a defaulted claim is available, even absent "cause" for the default, if the failure to consider the claim would result in a "fundamental miscarriage of justice." *Smith* v. *Murray*, 477 U. S. 527, 537–538 (1986); *Murray* v. *Carrier*, 477 U. S. 478, 495–496 (1986). In *Smith*, this Court applied the "fundamental miscarriage of justice" principle to an alleged sentencing error in a capital case. In an effort to equate review of convictions and sentences under this principle, the Court apparently settled upon the following standard: the habeas petitioner must make a "substantial" showing "that the alleged error undermined the accuracy of the guilt or sentencing determination." 477 U. S., at 539. Even this narrow standard makes clear that the "fundamental miscar-

riage of justice" principle is applicable to allegations of capital sentencing errors.[4]

Thus, under our precedents, the Court of Appeals was correct to review respondent's procedurally defaulted *Caldwell* claim if any one of three conditions is met: (1) the Florida Supreme Court's finding of procedural default was not an adequate and independent ground for its decision; (2) respondent can show cause for and prejudice from his default; or (3) the failure to review respondent's claim would result in a fundamental miscarriage of justice. Yet the Court devotes but a single footnote at the end of its opinion to the first and third of these principles. *Ante*, at 410–412, n. 6.

The Court acknowledges, as it must, that it granted certiorari to consider whether respondent had established "cause" for his procedural default. *Ante*, at 406. But this interest in the "cause" inquiry does not permit the Court to consign to second-class status the rest of the analysis necessary for determining whether the Court of Appeals properly considered the merits of respondent's *Caldwell* claim. Indeed, once the other two principles receive the attention they deserve, it becomes evident that each provides an alternative basis for affirming the Court of Appeals' judgment.

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[4] One may well be uncertain as to what meaning *Smith* gave to the term "fundamental miscarriage of justice." The opinion cites *Murray* v. *Carrier*, which states that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." 477 U. S., at 496. The *Smith* majority acknowledged, however, that the "concept of 'actual' . . . innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." *Id.*, at 537. Nonetheless, as is said in the text here, *Smith* appears to have rendered this translation: the refusal to review the constitutionality of a death sentence does not result in a fundamental miscarriage of justice unless there is a substantial claim that the constitutional violation undermined the accuracy of the sentencing decision. In any event, in evaluating whether respondent's procedural default precluded the Court of Appeals' consideration of his *Caldwell* claim, I assume, *arguendo*, that this is the governing standard after *Smith*.

II

The majority recognizes that a state court's reliance on a procedural bar rule is inadequate if that rule "has not been 'consistently or regularly applied.'" *Ante*, at 410, n. 6, quoting *Johnson* v. *Mississippi*, 486 U. S. 578, 589 (1988). The majority, however, asserts that in respondent's case the Florida Supreme Court's reliance on procedural bar grounds was adequate under this standard. I must disagree.

When respondent raised his *Caldwell* claim for the first time in his second postconviction motion under Rule 3.850 of the Florida Rules of Criminal Procedure, the Florida Supreme Court held this claim, among others, procedurally barred because respondent did not raise the claim in his direct appeal. See *Adams* v. *State*, 484 So. 2d 1216, 1217, cert. denied, 475 U. S. 1103 (1986). The court further found that presenting the *Caldwell* claim in a successive Rule 3.850 proceeding was an abuse of the Rule. 484 So. 2d, at 1217.[5] This decision issued on March 3, 1986.

Prior to that date, however, the Florida Supreme Court, in two Rule 3.850 cases, did not foreclose review of *Caldwell* claims, notwithstanding the existence of similar procedural defaults. First, in *Darden* v. *State*, 475 So. 2d 217 (1985), which also involved a second Rule 3.850 motion, the Florida

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[5] The Court of Appeals found, 816 F. 2d, at 1497, n. 3, and respondent argues, that the Florida Supreme Court did not hold the *Caldwell* claim an abuse of the Rule 3.850 procedure. This reading of the Florida court's opinion, however, appears to be contrary to its plain language:

"Having carefully reviewed [respondent's remaining claims], we find that each one either was or should have been raised on direct appeal. We therefore find that the review sought by [respondent] is barred *both* by Rule 3.850 as 'an abuse of the procedure governed by these rules,' and by the caselaw which has firmly established the necessity of raising all available issues upon direct appeal." 484 So. 2d, at 1217 (emphasis added).

It makes no difference for present purposes, however, whether respondent's claim was held barred on one ground or two; for reasons set forth in the text, neither procedural bar holding constitutes an adequate state ground for the Florida Supreme Court's judgment.

Supreme Court considered the merits of the *Caldwell* claim even though the prisoner there, like respondent here, failed to argue either on direct appeal or in his first Rule 3.850 motion that the jury was misled about its role in the capital sentencing process. See *Darden* v. *State*, 329 So. 2d 287 (1976) (direct appeal), cert. dism'd, 430 U. S. 704 (1977); *Darden* v. *State*, 372 So. 2d 437 (1979) (first Rule 3.850 motion).[6] Indeed, in "choos[ing] to address" the merits of the defaulted *Caldwell* claim in *Darden*, the Florida Supreme Court explicitly rebuffed the State's efforts to have the court reject the claim on the ground that its presentation constituted an abuse of the Rule 3.850 process. See 475 So. 2d, at 218.

Second, in *Mann* v. *State*, 482 So. 2d 1360 (1986), the Florida Supreme Court considered the merits of a *Caldwell* claim (among others), even though the claim was not raised on direct appeal. As the Eleventh Circuit noted, the Florida Supreme Court in *Mann* simply "chose not to enforce its own procedural default rule." *Mann* v. *Dugger*, 844 F. 2d 1446, 1448, n. 4 (1988) (en banc), cert. pending, No. 87–2073. Thus, by the time that it decided *Adams*, the Florida Supreme Court had failed to apply the State's procedural bar rules to at least two defaulted *Caldwell* claims.

Furthermore, in no case prior to *Adams* did the Florida Supreme Court plainly hold a *Caldwell* claim procedurally barred. Petitioners cite *Middleton* v. *State*, 465 So. 2d 1218, 1226 (1985), but it surely is questionable whether the reference to a procedural default in that case would satisfy the "plain statement" standard of *Harris* v. *Reed*, *ante*, p. 255.

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[6] On direct appeal, Darden challenged certain statements of the prosecutor as unconstitutionally prejudicial. These statements, however, did not concern the jury's role in the sentencing process and Darden did not suggest that the jury was misled about its role. See 329 So. 2d, at 289–291. In his second Rule 3.850 proceeding, in contrast, he "also attempt[ed] to show that as in *Caldwell*, the jury was misled as to its role in the sentencing process." 475 So. 2d, at 221.

In any event, even counting *Middleton* as a case in which the Florida Supreme Court invoked a procedural bar rule to preclude review of a *Caldwell* claim, it is impossible to say, in light of *Darden* and *Mann*, that the decision in *Adams* was an application of "strictly or regularly followed" state procedural requirements. *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). Consequently, the state-law ground in *Adams* would not have foreclosed this Court's consideration of the *Caldwell* claim had we chosen to exercise our certiorari jurisdiction on direct review, and, *a fortiori*, it does not preclude review of the *Caldwell* claim in this habeas proceeding. See *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

The majority's reasons for discounting *Darden* and *Mann* are not persuasive. As to *Darden*, the majority observes that the Florida Supreme Court did not discuss the prisoner's failure to raise his *Caldwell* claim on direct appeal, but rather mentioned only the failure to raise the *Caldwell* claim in a prior Rule 3.850 proceeding. But this observation misses the point. The fact remains that Darden on direct appeal did not raise his claim that the jury was misled about its role in sentencing him. See 329 So. 2d, at 288–291. Accordingly, *Darden* is a case in which the Florida Supreme Court did not bar review of a *Caldwell* claim, even though the claim was raised neither on direct appeal nor in the first Rule 3.850 proceeding. The treatment of the *Caldwell* claim in *Darden* is thus starkly inconsistent with the treatment of the *Caldwell* claim in *Adams*, despite the identical procedural posture of the two cases. For this reason alone, *Darden* demonstrates the inadequacy of the procedural bar ruling in *Adams*.

As to *Mann*, the majority notes that the court did not specifically mention the prisoner's *Caldwell* claim. But again, the majority misses the point. In respondent's case, too, the Flordia Supreme Court did not expressly mention the *Caldwell* claim. See 484 So. 2d, at 1217–1218. The issue here, however, is not whether the Florida Supreme Court in each case identified the claim by name, but whether it held the

claim procedurally barred. In *Mann*, it did not; in *Adams*, it did. Thus, the inconsistent treatment of the *Caldwell* claims in *Mann* and *Adams* supports a finding of inadequacy here.

In my view, then, the majority's attempts to distinguish *Darden* and *Mann* are clearly unavailing, and these two cases suffice to show that respondent's procedural default does not constitute an adequate state ground barring review of his *Caldwell* claim. Moreover, decisions of the Florida Supreme Court handed down after *Adams* reinforce the conclusion that that court has been inconsistent in applying its procedural bar rules to *Caldwell* claims. In *Combs* v. *State*, 525 So. 2d 853 (1988), the court did not invoke procedural default as a basis for decision, notwithstanding the prisoner's failure to present his *Caldwell* claim on direct appeal. See *Combs* v. *State*, 403 So. 2d 418, 420–421 (1981), cert. denied, 456 U. S. 984 (1982). Rather, the court affirmatively chose to address the merits of the *Caldwell* claim, largely because it wanted to announce its view that *Caldwell* is inapplicable to Florida capital cases.[7]

The Florida Supreme Court also did not rely on procedural bar grounds in *Daugherty* v. *State*, 533 So. 2d 287, cert. denied, 488 U. S. 959 (1988), even though that case involved a second Rule 3.850 motion and the convict there, like respondent here, did not raise his *Caldwell* claim either on direct review or in his first Rule 3.850 motion. See *Daugherty* v. *State*, 419 So. 2d 1067 (1982) (direct appeal), cert. denied, 459 U. S. 1228 (1983); *Daugherty* v. *State*, 505 So. 2d 1323 (first Rule 3.850 motion), cert. denied, 484 U. S. 891 (1987). Rather, in *Daugherty*, the court rested its rejection of the

[7] The majority attempts to dismiss *Combs* by saying that the court there noted the defendant's failure to raise the *Caldwell* claim at trial. But it is clear that the *Combs* decision did not rely on any procedural default as a basis for rejecting the *Caldwell* claim in that case. Rather, the *Combs* opinion is emphatic in expressing its desire to address the *Caldwell* claim on the merits. See 525 So. 2d, at 854–855. Consequently, *Combs* is further proof of the inconsistent treatment of *Caldwell* claims in Florida postconviction proceedings.

Caldwell claim solely on the ground that in *Combs* the court had "determined that *Caldwell* is inapplicable in Florida." 533 So. 2d, at 288.

Most recently, in *Glock* v. *Dugger*, 537 So. 2d 99 (1989), the Florida Supreme Court did not hold a *Caldwell* claim procedurally barred, even though the claim was not raised on direct appeal. *Puiatti* v. *State*, 495 So. 2d 128, 132 (Fla. 1986).[8] In sum, *Combs*, *Daugherty*, and *Glock* convincingly demonstrate that the Florida Supreme Court still does not strictly apply its procedural bar rules to *Caldwell* claims. Contrasting all five cases *(Darden*, *Mann*, *Combs*, *Daugherty*, and *Glock)* with *Adams*, one cannot seriously contend that the Florida Court has applied its procedural bar rules "evenhandedly to all similar claims." *Hathorn* v. *Lovorn*, 457 U. S. 255, 263 (1982).[9]

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[8] The majority's efforts to discount *Daugherty* and *Glock* reveal a fundamental misunderstanding of the consistency inquiry under *Johnson* v. *Mississippi*, 486 U. S. 578 (1986). This inquiry requires considering whether: (1) the prisoner asserted a *Caldwell* claim in his Rule 3.850 motion; (2) the *Caldwell* claim was not raised on direct appeal (or in a prior Rule 3.850 motion); and (3) the Florida Supreme Court did not hold the *Caldwell* claim procedurally barred. *Daugherty* and *Glock* satisfy all these criteria. Thus, they are cases in which the Florida Supreme Court failed to apply its procedural bar rules to *Caldwell* claims, thereby undercutting the consistency of the court's application of those rules to similarly situated claims.

That *Daugherty* relied on *Combs* does not negate this fact. On the contrary, *Daugherty*'s exclusive reliance on *Combs* as the basis for deciding the *Caldwell* issue proves conclusively that *Daugherty* was not an application of a procedural bar rule. Similarly, regarding *Glock*, it is irrelevant "whether the trial court held that the *Caldwell* claim was or was not procedurally barred." *Ante*, at 411–412, n. 6. Either way, it remains true that the Florida Supreme Court did not hold the *Caldwell* claim procedurally barred, which is the relevant point for the consistency issue.

[9] To be sure, in 1987 and 1988, the Florida Supreme Court most of the time held *Caldwell* claims to be procedurally barred, but this fact does not undermine the conclusion that, at the very least, when the Florida Supreme Court decided *Adams*, it did not "consistently or regularly" apply its procedural bar rule to a *Caldwell* claim. *Johnson* v. *Mississippi*, 486 U. S., at 587. Nor does it negate the fact that that court persists in failing to treat *Caldwell* claims in an evenhanded manner.

Thus, once the adequacy issue is fully considered, there is no escaping the conclusion that the Florida Supreme Court's rejection of respondent's *Caldwell* claim did not rest on an adequate state ground. Yet, in unseemly haste to reverse the Court of Appeals on the issue of "cause," the majority treats the adequacy issue as an afterthought, although it is an analytically antecedent issue.[10]

III

Even if, somehow, I could be convinced that the Florida Supreme Court's reliance on respondent's procedural default was "adequate," within the meaning of this Court's precedents, I would still conclude that the Court of Appeals properly reached the merits of respondent's *Caldwell* claim. I have no quarrel with the majority's determination that respondent cannot show "cause" for his procedural default.[11]

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[10] In addition, this Court historically has expressed particular reluctance to give force to a state court's discretionary refusal to consider a capital defendant's meritorious federal constitutional claim for reasons of procedural default. See *Williams* v. *Georgia*, 349 U. S. 375 (1955); *Patterson* v. *Alabama*, 294 U. S. 600 (1935). In holding the state procedural bar adequate here, the majority ignores these longstanding precedents.

[11] I nonetheless digress to note one disturbing aspect of the majority's analysis of the "cause" issue.

The majority broadly asserts: "To establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Ante*, at 407. More pointedly, the majority continues: "Respondent therefore must be asserting in this case that the trial court's remarks violated state law." *Ante*, at 407–408. But contrary to the majority's description of *Caldwell*'s holding, it may be possible to establish a *Caldwell* violation by showing that jury instructions, although accurate under state law, nonetheless minimize the jury's sense of responsibility in the sentencing process. See *Steffen* v. *Ohio*, 485 U. S. 916 (1988) (BRENNAN, J., dissenting from denial of certiorari). The Court need not address this issue here, however, because respondent *is* asserting what the majority contends he "must be asserting": his particular *Caldwell* claim rests on the premise that his jury was given inaccurate information about its role under state law. Brief for Respondent 25–49. Thus, it would suffice to say that respondent lacks "cause" for

"That determination, however, does not end our inquiry." *Smith* v. *Murray*, 477 U. S., at 537.

Rather, as the majority apparently recognizes, we must consider whether the failure to examine the merits of the *Caldwell* claim in this habeas action would result in a fundamental miscarriage of justice. The majority believes that no such injustice would occur. Again, I disagree.

Respondent's *Caldwell* claim, see generally Brief for Respondent 25–49, rests on the following premises: Under Florida law, the judge at his trial was permitted to overturn the jury's judgment on whether he should receive a life or a death sentence only upon a clear and convincing showing that the jury's choice was erroneous.[12] Notwithstanding this rule of Florida law, the trial judge repeatedly and insistently told the jurors that their sentencing vote was "strictly a recommendation and nothing more," that he was "not bound to follow that recommendation," and that he was "the sole determiner on whether or not [respondent] receives life or is put into the electric chair." App. 28, 69, 78, 79. Furthermore, the judge drummed this misinformation into the jurors' heads by repeatedly telling them that "the most important thing . . . to remember" was the nonbinding nature of their recommendation and that the capital sentencing decision was not on their "conscience" but on his. *Id.*, at 69–70, 77–78.

If (as the Court of Appeals held and we must assume) these repeated and insistent comments mischaracterized the jury's role under state law, then the sentencing process in respondent's case was so distorted as to render the sentence inherently suspect. The alleged error in this case was severe: the incorrect instructions may well have caused the jury to vote for a death sentence that it would not have returned had it been accurately instructed. See *Caldwell* v. *Mississippi*,

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his procedural default because under his own theory of his *Caldwell* claim the objectionable instructions were erroneous under state law.

[12] See *Harich* v. *Dugger*, 844 F. 2d, at 1473; see also *Mann* v. *Dugger*, 844 F. 2d 1446, 1450–1455 (CA11 1988) (en banc), cert. pending, No. 87–2073.

472 U. S., at 331–333. Jurors who erroneously believe that responsibility for the defendant's death lies on someone else's conscience may be more willing to vote for death "to 'send a message' of extreme disapproval for the defendant's acts." *Id.*, at 331. Thus, it is plain that respondent has presented a "substantial claim that the alleged error undermined the accuracy of the . . . sentencing determination" at his trial. *Smith* v. *Murray*, 477 U. S., at 539. Indeed, the very essence of a *Caldwell* claim is that the accuracy of the sentencing determination has been unconstitutionally undermined.

In this respect, the alleged sentencing error here is entirely unlike the one at issue in *Smith* itself. There, admission of particular testimony allegedly violated the Fifth and Eighth Amendments,[13] and the question was whether its admission "pervert[ed] the jury's deliberations" on issues relevant to its capital sentencing determination. 477 U. S., at 538. This case, in contrast, does not concern the inclusion or exclusion of particular evidence, but does concern a detailed and repeated explanation of the jury's responsibility, or lack of it, in the sentencing process. The alleged error thus is global in scope: it necessarily pervades the entire sentencing process. Indeed, the alleged error in this case, if true, could not help but pervert the sentencing decision.[14] Conse-

[13] The testimony at issue in *Smith* was that of the defendant's court-appointed psychiatrist: during the psychiatric evaluation, the defendant discussed a prior incident of deviant sexual conduct on his part. At the sentencing phase of the trial, the prosecution called the psychiatrist to the stand and elicited a description of what the defendant had said.

[14] As even the majority appears to recognize, *ante*, at 410–412, n. 6, the trial judge's finding of an equal number of aggravating and mitigating circumstances lends further support to respondent's contention that review of his *Caldwell* claim is necessary to avoid a fundamental miscarriage of justice. The equal number of aggravating and mitigating circumstances suggests that the sentencing decision was a close call—as does the fact that two justices of the Florida Supreme Court dissented on respondent's direct appeal. See *Adams* v. *State*, 412 So. 2d 850, 857 (1982). Under these circumstances, it is all the more likely that egregiously misinforming the jury of its role in the process affected the result.

quently, respondent's *Caldwell* claim must fall within the scope of the "fundamental miscarriage of justice" exception to the *Sykes* "cause" and "prejudice" test, unless the Court today means to repudiate *sub silentio* its opinion in *Smith*.

In other words, respondent's *Caldwell* claim is precisely the kind of claim that remains reviewable in a federal habeas action even though respondent cannot establish cause for his procedural default. See *Smith*, 477 U. S., at 537–539. In holding otherwise, the Court sends respondent to an execution that not only is presumptively unlawful, but is presumptively inaccurate as well. See *Caldwell*, 472 U. S., at 331. Nothing in the habeas corpus precedents of this Court calls for this consummately capricious result.[15]

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[15] The majority "do[es] not undertake here to define what it means to be 'actually innocent' of a death sentence," *ante*, at 412, n. 6, yet apparently concludes that respondent cannot show that he "probably is 'actually innocent' of the sentence he . . . received." *Ibid.* This incoherence in the Court's decisionmaking would be disturbing in any case, but is especially shocking in a capital case. Moreover, the majority "recognize[s] the difficulty" of applying the concept of "'actual' innocence" to sentencing determinations, *ibid.*, yet persists in using that problematic term without any clarification of its meaning in the sentencing context. *Ibid.*

What is worse, the Court in *Smith* v. *Murray* did articulate a standard, and yet the Court today ignores it. I was not in the majority in *Smith*, but here I have attempted faithfully to apply the standard articulated by the *Smith* majority, as best as I can discern it: whether the prisoner has demonstrated a "substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination." 477 U. S., at 539; see also *Harris* v. *Reed*, *ante*, at 268 (O'CONNOR, J., concurring) (quoting the relevant language from *Smith*). The majority today refuses to apply this standard because it is evident that respondent must prevail under it. The "alleged error" here—telling the jurors that the death sentence was not on their consciences, when under Florida law their sentencing determination was binding unless clearly erroneous—is such that respondent undoubtedly has presented a "substantial claim" that this error "undermined the accuracy" of his sentence, especially given the equal number of aggravating and mitigating circumstances in his case. See n. 13, *supra*.

By refusing to apply this standard, the Court today effectively discards its own opinion in *Smith*. Yet, in also refusing to define "actual innocence"

IV

Contrary to the result reached by the majority today, our precedents amply support the Court of Appeals' decision to consider whether respondent's death sentence was unconstitutionally unreliable despite respondent's failure to raise this constitutional issue in accordance with state procedures. It is not surprising, I suppose, that the Court misses the force of these precedents, since it confines two-thirds of the relevant inquiry to a single footnote at the end of its opinion.

If the Court can reach the question of "cause," on which certiorari was granted, only by making a mockery of the requirement that state procedural bar rules be "appl[ied] evenhandedly to all similar claims," *Hathorn* v. *Lovorn*, 457 U. S., at 263, then the Court should dismiss the writ of certiorari as improvidently granted. Similarly, if the Court does not wish to undertake the task of applying the "fundamental miscarriage of justice" inquiry, then it should remand the case to the Court of Appeals for that purpose. But inasmuch as the Court has chosen to decide these issues, the conclusory treatment they receive does not suffice to discharge the Court's responsibilities to respondent, for whom these issues are a matter of life or death. Indeed, I would have expected that when this Court reinstates a death sentence vacated by the judgment below (and does so purely for procedural reasons), it would be particularly careful to consider fully all issues necessary to its disposition of the case. To judge by footnote 6 of the Court's opinion, this expectation was naive.

I dissent.

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in the sentencing context, the Court offers nothing in its place. In this way, the Court both leaves the law in a shambles and reinstates respondent's death sentence without ever bothering to determine what legal principle actually governs his case.

TRANS WORLD AIRLINES, INC. *v.* INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87-548. Argued November 7, 1988—Decided February 28, 1989

Although petitioner airline (TWA) and respondent flight attendants' union (IFFA) pursued all the required dispute resolution mechanisms of the Railway Labor Act (RLA), their negotiations over a new collective bargaining agreement were unsuccessful. The parties bargained over wages and working conditions but not over the existing agreement's seniority system, which ensured that the most senior qualified attendant who bid on a vacant job assignment, flight schedule, or base of operation (domicile) would obtain it, and would be least affected by periodic furloughs. During the IFFA's subsequent strike, TWA continued operations by hiring permanent replacements for strikers, by continuing to employ attendants who chose not to strike, and by rehiring strikers who abandoned the strike, and filled strike-created vacancies by application of the existing seniority bidding system to all working attendants. After the strike ended, and pursuant to its preannounced policy, TWA refused to displace permanent replacements or junior nonstriking attendants ("crossover" employees) with senior full-term strikers, many of whom were therefore left without an opportunity to return to work. Although a poststrike arbitral agreement guaranteed that all reinstated full-term strikers would be returned to work as vacancies arose and with precisely the seniority they would have had if no strike had occurred, the IFFA filed the instant action contending that, even assuming the strike was economic, the full-term strikers were entitled to displace the newly hired replacements and the less senior crossover attendants either under the terms of the prestrike collective bargaining agreement or under the RLA itself. The District Court denied relief for the most part, but the Court of Appeals, relying on its reading of the prestrike agreement and on judicial interpretation of the National Labor Relations Act (NLRA), reversed the lower court's ruling that the more senior full-term strikers could not displace junior crossovers.

Held: An employer is not required by the RLA to lay off junior crossover employees in order to reinstate more senior full-term strikers at the conclusion of a strike. Pp. 432-443.

(a) Nothing in the federal common labor law developed under the NLRA, which may provide guiding precedent in RLA cases, indicates that TWA's crossover policy is unlawful. In fact, under *NLRB* v.

Mackay Radio & Telegraph Co., 304 U. S. 333, and its progeny, it is not an unfair labor practice under the NLRA for an employer to refuse to discharge replacement employees in order to make room for strikers at the end of an economic strike. The IFFA's argument that the *Mackay Radio* rule is inapplicable to junior crossovers because those workers must be treated differently than newly hired permanent replacements (who, the union concedes, need not be displaced) is rejected, since full-term strikers at TWA, once reinstated, have lost no seniority either in absolute or relative terms, and will be able to displace junior flight attendants—whether new hires, crossovers, or full-term strikers—with regard to future reductions in force, vacancies in desirable assignments or domiciles, or periodic bids on job scheduling, and since any "cleavage" between junior crossovers and reinstated full-term strikers is merely the inevitable effect of TWA's lawful use of the economic weapons available to it during a period of self-help. *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, distinguished. To differentiate between crossovers and new hires in the manner the IFFA proposes would have the effect of penalizing those who exercised their right not to strike, which is protected both by the RLA and the NLRA, in order to benefit those who did strike, a result that is not required by the NLRA. Pp. 432–439.

(b) TWA's crossover policy is not forbidden by the RLA itself, which, in fact, provides greater avenues of self-help to parties that have exhausted the statute's extensive dispute resolution mechanisms than would be available under the NLRA. Section 2 Fourth of the RLA—which prohibits carriers from "influenc[ing] or coerc[ing] employees . . . not to join . . . any labor organization"—does not prohibit the policy, since that section is addressed primarily to the precertification rights of unorganized employees to organize and choose their representatives, with the intent of protecting the dispute resolution procedures' effectiveness by assuring that the employees' putative representative is not subject to employer control and that neither party will be able to enlist the courts to further its own partisan ends. Where, as here, the parties have exhausted those procedures and have reached an impasse, they are free, without threat of judicial involvement, to turn to any peaceful, self-help measures that do not strike a fundamental blow to union or employer activity and the collective bargaining process itself. Moreover, as the IFFA concedes, nothing in the collective bargaining agreement or any poststrike agreement prohibits TWA's crossover policy. Pp. 439–442.

(c) TWA's decision to guarantee to crossovers the same protections lawfully applied to new hires was a decision to apply the pre-existing seniority terms of the collective bargaining agreement uniformly to all employees. That this decision had the effect of encouraging prestrike

workers to remain on the job during the strike or to abandon the strike before all vacancies were filled was simply an effect of TWA's lawful exercise of its peaceful economic power. P. 443.

819 F. 2d 839, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 443. BLACKMUN, J., filed a dissenting opinion, in Parts I and II of which BRENNAN, J., joined, *post*, p. 452.

Murray Gartner argued the cause for petitioner. With him on the briefs were *Paul E. Donnelly*, *Mark A. Buckstein*, *Michael A. Katz*, *Carole O'Blenes*, *Toby R. Hyman*, *Andrew P. Marks*, and *Richard M. Klein*.

Lawrence S. Robbins argued the cause for the National Labor Relations Board as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried*, *Deputy Solicitor General Cohen*, *Glen D. Nager*, *Rosemary M. Collyer*, *Robert E. Allen*, *Norton J. Come*, and *Linda Sher*.

John P. Hurley argued the cause for respondent. With him on the brief were *William A. Jolley*, *Marsha S. Berzon*, and *Laurence Gold*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

We decide today whether, at the end of a strike, an employer is required by the Railway Labor Act (RLA or Act), 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.*, to displace employees who worked during the strike in order to reinstate striking employees with greater seniority.

I

In March 1984, Trans World Airlines, Inc. (TWA), and the Independent Federation of Flight Attendants (IFFA or

*Briefs of *amici curiae* urging reversal were filed for the Airline Industrial Relations Conference by *Harry A. Rissetto* and *Thomas E. Reinert, Jr.*; for the Chamber of Commerce of the United States by *Stephen A. Bokat*; and for Crossover Flight Attendants by *Mark P. Johnson*.

Union) began negotiations pursuant to § 6 of the RLA, 45 U. S. C. § 156, on a new collective bargaining agreement to replace their prior agreement due to expire on July 31, 1984. The existing collective bargaining agreement created a complex system of bidding the general effect of which was to insure that those flight attendants with the greatest seniority would have the best opportunity to obtain their preferred job assignments, flight schedules, and bases of operation as vacancies appeared, and to insure that senior flight attendants would be least affected by the periodic furloughs endemic to the airline industry. Thus, for example, should a job vacancy appear at the highly desirable Los Angeles or San Francisco bases of operation or "domiciles," the most senior qualified flight attendant who bid on such a vacancy would be entitled to it. Conversely, should a reduction in force eliminate a position in the Los Angeles domicile, the furloughed flight attendant could opt to displace the most junior attendant of equal rank in the entire system or the most junior attendant of lower rank either at the same domicile or in the entire system. 1981–1984 TWA/IFFA Collective Bargaining Agreement, Arts. 12–13, 18–A, 18–B, reprinted in App. 31–62.

For two years TWA and the Union unsuccessfully bargained over wages and working conditions not including the seniority bidding system. They pursued all the required dispute resolution mechanisms of the RLA, including direct negotiation, 45 U. S. C. § 152 Second, mediation, 45 U. S. C. § 155 First, and the final 30-day "cooling off" period. *Ibid.* By early 1986 a strike seemed imminent, and on March 7, 1986, the Union went out on strike.

TWA informed its flight attendants before and during the strike that it would continue operations by hiring permanent replacements for striking flight attendants, by continuing to employ any flight attendant who chose not to strike, and by rehiring any striker who abandoned the strike and made an unconditional offer to return to any available vacancies.

TWA also informed its flight attendants that any vacancies created as a result of the strike would be filled by application of the seniority bidding system to all working flight attendants and that such job and domicile assignments would remain effective after the strike ended. App. 120–122, 132–134, 137–139. Thus, at the conclusion of the strike, senior full-term strikers would not be permitted to displace permanent replacements or junior nonstriking flight attendants and could be left without an opportunity to return to work. TWA's promise not to displace working flight attendants after the strike created two incentives specifically linked to the seniority bidding system: it gave senior flight attendants an incentive to remain at, or return to, work in order to retain their prior jobs and domicile assignments; it gave junior flight attendants an incentive to remain at, or return to, work in order to obtain job and domicile assignments that were previously occupied by more senior, striking flight attendants.

As promised, TWA continued its operations during the 72-day strike by utilizing approximately 1,280 flight attendants who either did not strike or returned to work before the end of the strike and by hiring and fully training approximately 2,350 new flight attendants, some 1,220 of whom were hired during the first few days of the strike. On May 17, 1986, the Union made an unconditional offer to TWA on behalf of the approximately 5,000 flight attendants who had remained on strike to return to work. TWA accepted the offer but refused the Union's May 27th demand that TWA displace those prestrike employees who were working as of May 17th ("crossover" employees). Accordingly, TWA initially recalled only the 197 most senior full-term strikers to fill available job and domicile vacancies. By the terms of a poststrike arbitral agreement, these strikers and all subsequently reinstated full-term strikers returned to work as vacancies arose and with precisely the seniority they would have had if no strike

had occurred. In May 1988, more than 1,100 full-term strikers had been reinstated with full seniority.

In an effort to reinstate all the full-term strikers by displacing the newly hired flight attendants and less senior crossover employees, the Union proceeded on two fronts. First, it brought an injunction action alleging that the full-term strikers were not "economic strikers" but "unfair labor practice strikers" entitled to reinstatement by application of principles this Court has developed in interpreting the National Labor Relations Act (NLRA). 29 U. S. C. § 151 *et seq.* See *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270 (1956). The District Court ultimately ruled against the Union on this claim. *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc.*, 682 F. Supp. 1003 (WD Mo. 1988), appeal pending, No. 88–1984M (CA8). At the same time, the Union filed the instant action contending that, even assuming the strike was economic, the full-term strikers were entitled to reinstatement either under the terms of the prestrike collective bargaining agreement or under the RLA itself. On cross motions for partial summary judgment, the District Court held that the full-term strikers were not entitled to displace either the junior crossovers or the 1,220 new hires employed by TWA immediately after the strike commenced. (The motions did not require the District Court to rule on the status of the remaining new hires.) The District Court also held that 463 new hires not fully trained by the end of the strike could be displaced by full-term strikers. *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc.*, 643 F. Supp. 470 (WD Mo. 1986).

Meanwhile, TWA sought a declaratory judgment that the union security clause of the prestrike collective bargaining agreement containing provisions for the checkoff of union dues and a requirement that new hires join the Union did not survive the self-help period after the parties had bargained to impasse. On cross motions for summary judgment, the same District Court ruled that, because the union security clause

was not part of the prestrike negotiations, it had survived the strike. *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 640 F. Supp. 1108 (WD Mo. 1986).

Appeals were taken from both judgments. The Court of Appeals affirmed the District Court's ruling that the union security clause had survived the period of self-help. *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 809 F. 2d 483 (CA8 1987). In a separate opinion, the same panel also affirmed the District Court's ruling that full-term strikers could not displace the 1,220 fully trained new hires but could displace the 463 untrained new hires. *Independent Federation of Flight Attendants* v. *Trans World Airlines, Inc.*, 819 F. 2d 839 (CA8 1987). The Court of Appeals, however, reversed the District Court's ruling that more senior full-term strikers could not displace junior crossovers. In so holding, the court relied primarily on its reading of the union security clause of the prestrike collective bargaining agreement and, secondarily, on judicial interpretations of the NLRA. *Id.*, at 843–845.

We granted petitions for writs of certiorari in both cases. *Trans World Airlines, Inc.* v. *Flight Attendants*, 482 U. S. 913 (1987) *(TWA I); Flight Attendants* v. *Trans World Airlines, Inc.*, 485 U. S. 958 (1988) *(TWA II)* (certiorari granted only to consider displacement of crossovers). Last Term, we affirmed by an equally divided Court the judgment of the Court of Appeals in *TWA I* that the union security clause survived the strike. 485 U. S. 175 (1988). Today, we reverse the Court of Appeals in *TWA II* and hold that an employer is not required by the RLA to lay off junior crossovers in order to reinstate more senior full-term strikers at the conclusion of a strike.

II

We have observed in the past that carefully drawn analogies from the federal common labor law developed under the NLRA may be helpful in deciding cases under the RLA. *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 377

(1969). Thus, as in this case, those lower courts that have examined the reinstatement rights of strikers under the RLA have turned to NLRA precedents for guidance. *E. g., Air Line Pilots Assn. International* v. *United Air Lines, Inc.*, 614 F. Supp. 1020, 1041, 1045–1046 (ND Ill. 1985), aff'd in part and rev'd in part on other grounds, 802 F. 2d 886 (CA7 1986), cert. denied, 480 U. S. 946 (1987); *National Airlines, Inc.* v. *International Assn. of Machinists & Aerospace Workers*, 416 F. 2d 998, 1004–1006 (CA5 1969).

We first considered the reinstatement rights of strikers under the NLRA in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938). In *Mackay Radio*, radio and telegraph operators working in the San Francisco offices of a national telecommunications firm went on strike. In order to continue operations, the employer brought employees from its other offices to fill the strikers' places. At the conclusion of the strike, the striking operators sought to displace their replacements in order to return to work. We held that it was not an unfair labor practice under §8 of the NLRA for the employer to have replaced the striking employees with others "in an effort to carry on the business," or to have refused to discharge the replacements in order to make room for the strikers at the conclusion of the strike. *Id.*, at 345–346. As we there observed, "[t]he assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled." *Id.*, at 346. On various occasions we have reaffirmed the holding of *Mackay Radio*. See *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 232 (1963) ("We have no intention of questioning the continuing vitality of the *Mackay* rule . . ."); *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S. 375, 379 (1967) (Employers have "'legitimate and substantial business justifications' for refusing to reinstate employees who engaged in an economic strike . . . when the jobs claimed by the

strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations"); *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 504, n. 8 (1983) ("The refusal to fire permanent replacements because of commitments made to them in the course of an economic strike satisfies the requirement . . . that the employer have a 'legitimate and substantial justification' for its refusal to reinstate strikers").

TWA asks us to apply this line of cases decided under the NLRA to determine the status under the RLA of those prestrike flight attendants who were working at the conclusion of the strike. TWA argues that it would be completely anomalous to hold that full-term strikers may displace junior crossovers when, as the Union has conceded, they may not displace newly hired permanent replacements under either statute. The Union, by contrast, argues that the rule of *Mackay Radio* is inapplicable to junior crossovers because of differences between the RLA and the NLRA and because, even under the NLRA, junior crossovers would be treated differently from newly hired permanent replacements.[1]

The Union relies on *Erie Resistor*, *supra*, to distinguish junior crossovers from new hires under the NLRA. In *Erie Resistor* we struck down an employer's award of 20 years' superseniority to new hires and crossovers as an unfair labor practice within the meaning of § 8(a)(1) and § 8(a)(3) of the NLRA. 29 U. S. C. §§ 158(a)(1), 158(a)(3). We observed:

> ". . . Super-seniority affects the tenure of all strikers whereas permanent replacement, proper under *Mackay*, affects only those who are, in actuality, replaced. It is

[1] The Union has abandoned as irrelevant arguments that persuaded the Court of Appeals below, based on its holding in *TWA I*, that the union security clause of the prestrike collective bargaining agreement had survived the strike. Brief for Respondent 4, n. 6. We agree that this concession by the Union is proper. Nothing in the prestrike collective bargaining agreement guaranteed reinstatement of striking flight attendants to positions occupied by junior crossovers.

one thing to say that a striker is subject to loss of his job at the strike's end but quite another to hold that in addition to the threat of replacement, all strikers will at best return to their jobs with seniority inferior to that of the replacements and of those who left the strike.

". . . Unlike the replacement granted in *Mackay* which ceases to be an issue once the strike is over, the [superseniority] plan here creates a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is reemphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general." 373 U. S., at 230–231.

The Union does not and cannot contend that reinstated full-term strikers have less seniority relative to new hires and junior crossovers than they would have had if they had not remained on strike. It is clear that reinstated full-term strikers lost no seniority either in absolute or relative terms. Thus, unlike the situation in *Erie Resistor*, any future reductions in force at TWA will permit reinstated full-term strikers to displace junior flight attendants exactly as would have been the case in the absence of any strike. Similarly, should any vacancies develop in desirable job assignments or domiciles, reinstated full-term strikers who have bid on those vacancies will maintain their priority over junior flight attendants, whether they are new hires, crossovers, or full-term strikers. In the same vein, periodic bids on job scheduling will find senior reinstated full-term strikers maintaining their priority over all their junior colleagues. In short, once reinstated, the seniority of full-term strikers is in no way affected by their decision to strike.

Nevertheless, IFFA argues that TWA's refusal to displace junior crossovers will create a "cleavage" between junior crossovers and reinstated full-term strikers at TWA "long after the strike is ended." *Id.*, at 231. This is the case because desirable job assignments and domiciles that would have been occupied by the most senior flight attendants had there been no strike will continue to be held by those who did not see the strike through to its conclusion. For example, the senior full-term striker who worked in the Los Angeles domicile before the strike may have been replaced by a junior crossover. As poststrike vacancies develop in TWA's work force, permitting reinstatement of full-term strikers, they are not likely to occur in the most desirable domiciles. Thus, it is unlikely that the senior full-term striker would be reinstated back to her preferred domicile. Resentful rifts among employees will also persist after the strike, the Union argues, because TWA's prestrike assurance of nondisplacement to junior crossovers, unlike the same assurance to new hires, "set up a competition *among* those individuals who participated in the original decision to strike, and thereby undermined the group's ability to take the collective action that it is the very purpose of the [RLA] to protect." Brief for Respondent 36–37.

We reject this effort to expand *Erie Resistor*. Both the RLA and the NLRA protect an employee's right to choose not to strike. 45 U. S. C. § 152 Fourth; 29 U. S. C. § 157, and, thereby, protect employees' rights to "the benefit of their individual decisions not to strike . . . ." *Post*, at 448, n. 4 (BRENNAN, J., dissenting).[2] Accordingly, in virtually

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[2] Our affirmance in *TWA I* of the judgment that the union security clause sanctioned by 45 U. S. C. § 152 Eleventh survived the strike means that crossover and new hires continue to bear the burden of paying union dues. Free riding on the benefits that may come to these employees as a result of IFFA's status as the flight attendants' exclusive bargaining representative is thereby foreclosed. See *Machinists* v. *Street*, 367 U. S. 740, 760–762 (1961).

every strike situation there will be some employees who disagree with their union's decision to strike and who cannot be required to abide by that decision. It is the inevitable effect of an employer's use of the economic weapons available during a period of self-help that these differences will be exacerbated and that poststrike resentments may be created. Thus, for example, the employer's right to hire permanent replacements in order to continue operations will inevitably also have the effect of dividing striking employees between those who, fearful of permanently losing their jobs, return to work and those who remain stalwart in the strike. In such a situation, apart from the "pressure on the strikers *as a group* to abandon the strike," to which the dissent refers, *post*, at 449 (BRENNAN, J., dissenting), a "competition" may arise *among* the striking employees to return to work in order to avoid being displaced by a permanent replacement. Similarly, employee awareness that an employer may decide to transfer working employees to necessary positions previously occupied by more senior striking employees will isolate employees fearful of losing those positions and employees coveting those positions from employees more committed to the strike. Conversely, a policy such as TWA employed here, in creating the incentive for individual strikers to return to work, also "puts pressure on the strikers *as a group* to abandon the strike," *ibid.*, in the same manner that the hiring of permanent replacements does.

None of these scenarios, however, present the prospect of a continuing diminution of seniority upon reinstatement at the end of the strike that was central to our decision in *Erie Resistor*. All that has occurred is that the employer has filled vacancies created by striking employees. Some of these vacancies will be filled by newly hired employees, others by doubtless more experienced and therefore more needed employees who either refused to strike or abandoned the strike. The dissent's observation that, "at the conclusion of the strike," discrimination in the filling of "available

positions" based on union activity is impermissible is beside the point. See *post*, at 450 (BRENNAN, J., dissenting). The positions occupied by newly hired replacements, employees who refused to strike, and employees who abandoned the strike are simply not "available positions" to be filled. As noted above, those positions that were available at the conclusion of the strike were filled "according to some principle, such as seniority, that is neutral . . . ." *Ibid.* (BRENNAN, J., dissenting). That the prospect of a reduction in available positions may divide employees and create incentives among them to remain at work or abandon a strike before its conclusion is a secondary effect fairly within the arsenal of economic weapons available to employers during a period of self-help.

To distinguish crossovers from new hires in the manner IFFA proposes would have the effect of penalizing those who decided not to strike in order to benefit those who did. Because permanent replacements need not be discharged at the conclusion of a strike in which the union has been unsuccessful, a certain number of prestrike employees will find themselves without work. We see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful. Requiring junior crossovers, who cannot themselves displace the newly hired permanent replacements, and "who rank lowest in seniority," *post*, at 447 (BRENNAN, J., dissenting), to be displaced by more senior full-term strikers is precisely to visit the consequences of the lost gamble on those who refused to take the risk. While the employer and union in many circumstances may reach a back-to-work agreement that would displace crossovers and new hires or an employer may unilaterally decide to permit such displacement, nothing in the NLRA or the federal common law we have developed under that statute requires such a result. That such agreements are typically one mark of a successful strike is yet another indication that crossovers opted not to

gamble; if the strike was successful the advantage gained by declining to strike disappears.

III

The Union argues, however, that whether or not the NLRA prohibits a crossover policy such as TWA's, the statutory framework of the RLA forbids such a policy.

Although we have observed that the NLRA may provide useful analogies for interpreting the RLA, we have also emphasized that the NLRA "cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly with due regard for the many differences between the statutory schemes." *Trainmen* v. *Jacksonville Terminal*, 394 U. S., at 383. Thus, in *Trainmen* itself we declined to examine the "panoply of detailed law developed" under the NLRA to determine what kind of secondary picketing in a railway dispute may be enjoined by state courts. Rather, we held that Congress had entirely withdrawn such injunctive power from the States: "[P]arties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute . . . [may] employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law." *Id.*, at 391–392. Similarly, two Terms ago in *Burlington Northern R. Co.* v. *Maintenance of Way Employes*, 481 U. S. 429 (1987), we declined to find in the RLA an implied limit on a union's resort to secondary activity by analogy to the NLRA. These cases have read the RLA to provide greater avenues of self-help to parties that have exhausted the statute's "virtually endless," *id.*, at 444, dispute resolution mechanisms than would be available under the NLRA. Nevertheless, they provide the backdrop for the Union's contention that, in this case, we should understand provisions of the RLA to *limit* "the full range of whatever peaceful economic power [the parties] can

muster," *Trainmen*, *supra*, at 392, *beyond* the limitations even imposed by the NLRA. This we decline to do.

The Union points to § 2 Fourth of the RLA as the source of this limitation on the use of the employer's economic power. The section provides, in pertinent part:

> "No carrier, its officers or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, . . . or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization . . . ." 45 U. S. C. § 152 Fourth.

The Union argues that TWA's crossover policy, which created an incentive for flight attendants either not to join or to abandon the strike, constituted influence or coercion in an effort to induce the flight attendants not to remain members of IFFA and was, therefore, impermissible under § 2 Fourth.

Section 2 Fourth was enacted as part of the 1934 amendments to the RLA. 48 Stat. 1185. From the time of our very first opportunity to interpret the 1934 amendments, we have viewed them as addressing primarily the precertification rights and freedoms of unorganized employees. In *Virginian R. Co.* v. *Railway Employees*, 300 U. S. 515 (1937), we observed that the employees' freedom "to organize and to make choice of their representatives without the 'coercive interference' and 'pressure' of a company union . . . was continued and made more explicit by the amendment of 1934." *Id.*, at 543, citing § 2 Third, § 2 Fourth, and *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548 (1930). In *Switchmen* v. *National Mediation Bd.*, 320 U. S. 297 (1943), the Court divided over whether the federal courts have jurisdiction under § 2 Fourth to review a certification of union representatives for collective bargaining by the National Mediation Board acting under § 2 Ninth of the RLA as amended in 1934. Both the majority and the dissent agreed, however, that

"[t]he 1934 Act was directed particularly at control over the initial step in collective bargaining—the determination of the employees' representatives." *Id.*, at 317 (Reed, J., dissenting); see also *id.*, at 302 (opinion of the Court); *Machinists* v. *Street*, 367 U. S. 740, 759 (1961).

The explanation for the precertification focus of the 1934 amendments is clear. The RLA provides an exhaustively detailed procedural framework "to facilitate the voluntary settlement of major disputes." *Trainmen* v. *Jacksonville Terminal*, *supra*, at 378. The effectiveness of these private dispute resolution procedures depends on the initial assurance that the employees' putative representative is not subject to control by the employer and on the subsequent assurance that neither party will be able to enlist the courts to further its own partisan ends. See *Chicago & N. W. R. Co.* v. *Transportation Union*, 402 U. S. 570, 596–597 (1971) (BRENNAN, J., dissenting) (the duty to exhaust the dispute resolution procedures "does not contemplate that governmental power should, after failure of the parties to reach accord, be added to the scales in favor of either party and thus compel the other to agree upon the aided party's terms. Rather, at that point, impasse was to free both parties to resort to self-help"); *Burlington Northern*, *supra*, at 451–452 (the availability of self-help measures rather than judicial remedies "may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle prior to exhaustion of the statutory procedures"). Thus, we have understood judicial intervention in RLA procedures to be limited to those cases where "but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act." *Switchmen*, *supra*, at 300; *Chicago & N. W. R. Co.*, *supra*, at 595 (BRENNAN, J., dissenting) ("The underlying cohesiveness of the decisions [permitting judicial interference] lies in the fact that in each instance the scheme of the Railway Labor Act could not begin to work without judicial involvement").

Here, TWA and the Union followed without interference the scheme of the RLA to an unsuccessful conclusion and then turned to self-help. We have more than once observed that, at this final stage of a labor dispute regulated by the RLA, "the Act is wholly inexplicit as to the scope of allowable self-help." *Trainmen*, 394 U. S., at 391; *Burlington Northern*, 481 U. S., at 447–448. Such silence does not amount to a congressional *imprimatur* on all forms of postnegotiation self-help. It does, however, indicate that we should hesitate to imply limitations on all but those forms of self-help that strike a fundamental blow to union or employer activity and the collective bargaining process itself. Accordingly, just as we saw no statutory basis for limiting the secondary activities of unions during a period of self-help in *Trainmen* and *Burlington Northern*, we see no basis in §2 Fourth for prohibiting the crossover policy employed by TWA once bargaining had reached an impasse. Both self-help measures fall squarely within the "full range of whatever peaceful economic power [the parties] can muster" once they have "unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute . . . ." *Trainmen*, *supra*, at 392. Neither measure prevented the scheme of the RLA from working; neither measure was inherently destructive of union or employer activity. Similarly, we see nothing in *Railway Clerks* v. *Florida East Coast R. Co.*, 384 U. S. 238 (1966), so heavily relied upon by the Union, that is to the contrary. In *Florida East Coast* we recognized a carrier's ability to depart from the terms of an existing collective bargaining agreement when reasonably necessary to operate during a strike. As the Union itself concedes, see n. 1, *supra*, nothing in the collective bargaining agreement or any poststrike agreement between TWA and IFFA prohibits the crossover policy adopted by TWA. Thus, there was no departure from the collective bargaining agreement that would require an examination of reasonable necessity.

IV

Neither the RLA itself nor any analogies to the NLRA indicate that the crossover policy adopted by TWA during the period of self-help was unlawful. Rather, the decision to guarantee to crossovers the same protections lawfully applied to new hires was a simple decision to apply the preexisting seniority terms of the collective bargaining agreement uniformly to all working employees. That this decision had the effect of encouraging prestrike workers to remain on the job during the strike or to abandon the strike and return to work before all vacancies were filled was an effect of the exercise of TWA's peaceful economic power, a power that the company was legally free to deploy once the parties had exhausted the private dispute resolution mechanisms of the RLA. Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The issue in this case is whether under the Railway Labor Act (RLA) an employer, in allocating available jobs among members of a bargaining unit at the conclusion of a strike, may discriminate against full-term strikers by giving preference to employees who crossed the picket line to return to work before the strike was over. Because I conclude that such discrimination on the basis of union activity is "inherently destructive" of the right to strike, as guaranteed by both the RLA and the National Labor Relations Act (NLRA), I dissent.

I

Notwithstanding the Court's suggestion that the portion of the RLA at issue here addresses "primarily" the precertification context, *ante*, at 440, it should be clear that under the RLA an employee's right to strike is protected against coercion by her employer. The Court relies in part on *Trainmen*

v. *Jacksonville Terminal Co.*, 394 U. S. 369 (1969), but it overlooks the clear teaching of that case:

> "[E]mployees subject to the Railway Labor Act enjoy the right to engage in primary strikes over major disputes. . . . Whether the source of this right be found in a particular provision of the Railway Labor Act or in the scheme as a whole, it is integral to the Act." *Id.*, at 384–385 (footnote omitted).

The "particular provision," we made clear, was § 2 Fourth. *Id.*, at 385, n. 20. While the issue in *Jacksonville Terminal* was the extent of a state court's power to issue an antistrike injunction, we emphasized that the RLA's guarantee of the right to strike was not limited to the context of interference by the State: "However, § 2 Fourth of the RLA, added in 1934, was designed primarily, if not exclusively to prohibit *coercive employer practices*." *Ibid.* (emphasis added). Whatever may have been the "primary" purpose of § 2 Fourth, it is too late in the day to suggest that this provision, at least when read in the context of the entire RLA, does not prohibit employer coercion of the right to strike.

The Court compounds its error in regard to the reach of § 2 Fourth with a more fundamental mistake when it appears to assume that the employer's action in this case is sanctioned by the mere fact that it occurred during the "self-help" stage of the dispute. *Ante*, at 440–442. Clearly this cannot be the case. I am confident that the Court would agree, for example, that an employer could not legally *discharge* striking employees under the RLA. But if this is so, it must be because the RLA contains some injunction against employer interference with the right to strike, even when that interference consists of actions taken during the period of permissible self-help. Thus, the question is not whether the RLA protects the right to strike against employer coercion—for it surely does—but whether that protection goes so far as to prohibit the specific employer practice at issue here.

The key to this case is a fundamental command of the RLA and the NLRA alike, which in the case of the RLA is textually anchored in § 2 Fourth: the employer may not engage in discrimination among its employees—whether at the precertification stage, the bargaining stage, or during or after a strike—on the basis of their degree of involvement in protected union activity such as a strike.[1] This case thus falls within the class of cases in which judicial intervention to enforce the right at issue is justified because "the scheme of the Railway Labor Act could not begin to work without judicial involvement." *Chicago & N. W. R. Co.* v. *Transportation Union*, 402 U. S. 570, 595 (1971) (BRENNAN, J., dissenting). The "central theme" of the RLA is, of course, "to bring about voluntary settlement." *Ibid.* But "unless the unions fairly represented all of their employees; unless the employer bargained with the certified representative of the employees; unless the status quo was maintained during the entire range of bargaining, the statutory mechanism could not hope to induce a negotiated settlement." *Ibid.* The same is true here: the statutory scheme would be just as incapable of bringing about a negotiated settlement if the employer, in the name of "self-help," impermissibly retaliated against employees because of their exercise of their right under the RLA to engage in protected union activity such as a strike.[2]

II

A

That the RLA broadly enjoins discrimination against strikers does not necessarily settle the issue, of course. In the context of the NLRA we have on occasion found reason to

[1] We have noted that § 2 Fourth is "comparable" to § 7 of the NLRA, which protects the right to engage in concerted activities. *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369, 385, n. 20 (1969).

[2] It is particularly difficult to discern any reason why judicial intervention should be necessary to enforce a union's duty of fair representation under the RLA, see *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944), but not an employer's duty to refrain from discrimination based on union activity.

make an exception to that statute's nondiscrimination provision in the name of the employer's "necessity." See *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938). The RLA itself provides little guidance as to whether the employer is in any way privileged, in allocating jobs at the end of a strike, to give preference to bargaining unit members who crossed the picket line to return to work. As we have previously noted, "the Act is wholly inexplicit as to the scope of allowable self-help." *Jacksonville Terminal*, 394 U. S., at 391.

While of course "the National Labor Relations Act cannot be imported wholesale into the railway labor arena," *id.*, at 383, we have frequently "referred to the NLRA for assistance in construing the Railway Labor Act." *Ibid.* Given the paucity of RLA precedent on the specific issue before us, the Court quite properly looks to the NLRA for guidance. *Ante*, at 432–439. It arrives at an incorrect conclusion, however, because it mischaracterizes the employer's action and because it appears unwilling to take seriously the protection Congress has seen fit to afford to the right to strike.

The Court's conception of this case is most clearly expressed in a key paragraph that summarizes its discussion of the NLRA case law:

> "To distinguish crossovers from new hires in the manner IFFA proposes would have the effect of penalizing those who decided not to strike in order to benefit those who did. . . . We see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful. Requiring junior crossovers . . . to be displaced by more senior full-term strikers is precisely to visit the consequences of the lost gamble on those who refused to take the risk." *Ante*, at 438.

This understanding of the Union's position contains a factual and a legal error, both of which infect the Court's analysis of the case.

In the first place, refusing to discriminate in favor of crossovers is not to visit the consequences of the lost strike on "those who refused to take the risk," but rather on those who rank lowest in seniority. Whether a given flight attendant chose to take the risk of the strike or not is wholly immaterial. Rather—as is virtually universally the case when work-force reductions are necessary for whatever reason in a unionized enterprise—it is the most junior employees, whether strikers or crossovers, who are most vulnerable. This is precisely the point of seniority.

More fundamental, I fear, is the legal mistake inherent in the Court's objection to "penalizing those who decided not to strike in order to benefit those who did." The Court, of course, does precisely the opposite: it allows TWA to single out for penalty precisely those employees who were faithful to the strike until the end, in order to benefit those who abandoned it. What is unarticulated is the Court's basis for choosing one position over the other. If indeed one group or the other is to be "penalized,"[3] what basis does the Court have for determining that it should be those who remained on strike rather than those who returned to work? I see none, unless it is perhaps an unarticulated hostility toward strikes. In any case the NLRA *does* provide a basis for resolving this question. It requires simply that in making poststrike reinstatements an employer may not discriminate among its employees on account of their union activity. That, in fact, is the *holding* of *NLRB* v. *Mackay Radio*, *supra*, at 346—the more familiar teaching as to the employer's right to hire permanent replacements having been dictum. If an employer may not discriminate—in either direction—on the basis of the employee's strike activity, then it follows that the employer must make decisions about which employees to reinstate on

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[3] Of course, as explained in the preceding paragraph, the position the Union advocates does not "penalize" any employee on the basis of her decision to strike or not to strike.

the basis of some neutral criterion, such as seniority. That is precisely what the Union asks.[4]

B

We have recognized only a narrow exception to the general principle prohibiting discrimination against employees for exercising their right to strike. Since *Mackay Radio* it has been accepted that an employer may hire "permanent replacements" in order to maintain operations during a strike, and that these replacements need not be displaced to make room for returning strikers. The question here is whether the *Mackay* exception should be expanded to cover the present case, involving as it does members of the striking bargaining unit who have crossed the picket lines, rather than new hires from outside the bargaining unit. Despite the superficial similarity between the two situations, strong reasons counsel against applying the *Mackay* rule to crossover employees.

The employer's promise to members of the bargaining unit that they will not be displaced at the end of a strike if they

[4] That some crossovers, like some strikers—in both cases the most junior members of the work force—may lose their jobs because of the collective decision to strike is simply a reflection of the employer's right to hire "permanent replacements," or perhaps of a downturn in business due to the strike or other factors. The Court's argument that the crossovers should not be "penalized" rests on its apparent belief that they should not be denied the benefit of their individual decisions not to strike (although it should be noted that the Court apparently objects to "penalizing" even those crossovers who voted *for* the strike, as long as they repented of that decision before the strike ended). But "[u]nion activity, by its very nature, is group activity," *NLRB* v. *Textile Workers*, 409 U. S. 213, 221 (1972) (BLACKMUN, J., dissenting), and inherent in the system of exclusive bargaining representatives, which is a fundament of our labor law, is the principle of majority decision—even where such decisions may impose costs on the dissenting minority. The contrary rule, moreover, would allow the employee who abandons the collectively taken decision to strike to become a free rider, enjoying the benefit of any gains won by the strike, but without sharing in its risk. See *Pattern Makers* v. *NLRB*, 473 U. S. 95, 129 (1985) (BLACKMUN, J., dissenting).

cross the picket lines addresses a far different incentive to the bargaining-unit members than does the employer's promise of permanence to new hires. The employer's threat to hire permanent replacements from outside the existing work force puts pressure on the strikers *as a group* to abandon the strike before their positions are filled by others. But the employer's promise to members of the striking bargaining unit that if they abandon the strike (or refuse to join it at the outset) they will retain their jobs at strike's end in preference to more senior workers who remain on strike produces an additional dynamic: now there is also an incentive for *individual* workers to seek to save (or improve) their own positions at the expense of other members of the striking bargaining unit. We have previously observed that offers of "individual benefits to the strikers to induce them to abandon the strike . . . could be expected to undermine the strikers' mutual interest and place the entire strike effort in jeopardy." *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 230–231 (1963). Such a "divide and conquer" tactic thus "strike[s] a fundamental blow to union . . . activity and the collective bargaining process itself." *Ante*, at 442.

In *Erie Resistor* we found the employer's offer of superseniority to new hires and crossovers to be "inherently destructive" of the right to strike and therefore in contravention of §§ 8(a)(1) and (a)(3) of the NLRA. 373 U. S., at 231–232. In my view the same conclusion should apply here. Beyond its specific holding outlawing superseniority, I read *Erie Resistor* to stand for the principle that there are certain tools an employer may not use, even in the interest of continued operations during a strike, and that the permissibility of discriminatory measures taken for that purpose must be evaluated by weighing the "necessity" of the employer's action (*i. e.*, its interest in maintaining operations during the strike) against its prejudice to the employees' right to strike.[5] It

[5] Unlike JUSTICE BLACKMUN, *post*, at 464–466, I would weigh necessity and prejudice in categories of situations rather than on a case-by-case

seems clear to me that in this case the result of such an analysis should be to forbid the employer to give preferential treatment to crossovers, because of the destructive impact of such an action on the strikers' mutual interest. Thus, when an employer recalls workers to fill the available positions at the conclusion of a strike, it may not discriminate against either the strikers or the crossovers. Rather it must proceed according to some principle, such as seniority, that is neutral as between them.[6] That TWA failed to do.[7]

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basis. Thus, just as in *Erie Resistor* where we held grants of superseniority to be *per se* illegal, regardless of the business necessity that might be found in the particular case, I have no difficulty in determining that discrimination in favor of crossovers in poststrike callbacks—even if perhaps less egregious than grants of superseniority—is inherently destructive of the right to strike, notwithstanding whatever business purpose the employer might be able to assert in an individual case. I agree, in any event, with JUSTICE BLACKMUN's conclusion, *post*, at 466, that such employer conduct could rarely be shown to be "necessary" under the standard of *Railway Clerks* v. *Florida East Coast R. Co.*, 384 U. S. 238 (1966).

[6] While there might be circumstances in which some neutral principle other than seniority might be acceptable as a basis for recalls (*e. g.*, the employer's need for particular skills), seniority is so well established in labor relations as the basis for such decisions that exceptions should be rare. Indeed we have described seniority as of "overriding importance" in "determin[ing] who gets or who keeps an available job." *Humphrey* v. *Moore*, 375 U. S. 335, 346–347 (1964). In any case, TWA has made no pretense that its discriminatory recalls are justified by some other neutral principle.

[7] The NLRB, in an *amicus* brief, argues that the employer not only may, but must, accord preferential treatment to crossovers, on the ground that once the crossovers have resumed work—which they have a right to do if jobs are available—the positions they occupy are not "vacant" at the end of the strike. Brief for NLRB as *Amicus Curiae* 13–15; see also *ante*, at 438. This argument simply begs the question. If the employer is prohibited from discriminating among members of the bargaining unit on the basis of strike activity in allocating poststrike jobs, then the employer may not promise certain bargaining-unit members that the jobs will be theirs permanently, merely because those members returned to work during the strike. Whether or not the employer may do this is precisely the question this case presents, and the answer to that question cannot be assumed by

III

Precedent under the NLRA clearly forbids an employer to burden the right to strike in the manner TWA has done in this case, and I see no reason why that conclusion should not apply equally under the RLA.

In a case like this it is not difficult to conjure up a parade of horribles to support either position. Forbidding an employer to discriminate in favor of crossovers, as I would do, makes it impossible for a junior employee who does not want to strike, and who is unable to persuade a majority of her colleagues to adopt that stance, to be sure that she can save her job. But that employee is in the same position she would be in if a layoff were necessary for other reasons beyond her control, such as an economic downturn. The principle of seniority is based on the notion that it is those employees who have worked longest in an enterprise and therefore have most at stake whose jobs should be most protected. Permitting the employer to give preference to crossovers, as the Court today does, will mean that an employee of only six months' experience, who abandoned the strike one day before it ended, could displace a 20-year veteran who chose to remain faithful to the decision made collectively with her fellow workers until the group as a whole decided to end the strike. Unfortunately there will be individual injustices whichever

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stating it as a premise. Neither *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S. 375 (1967), nor *Laidlaw Corp.*, 171 N. L. R. B. 1366 (1968), dealt with the conflicting rights of crossovers and full-term strikers.

Similarly, the Court's concluding statement that "the decision to guarantee to crossovers the same protections lawfully applied to new hires was a simple decision to apply the pre-existing seniority terms of the collective bargaining agreement uniformly to all *working* employees," *ante*, at 443 (emphasis added), again assumes what must be proved. If "working" refers to the poststrike period, which employees are working and which are not is a function of the employer's decision to give preference to the crossovers; if instead it refers to the period prior to the strike's end, the question remains whether the employer may make poststrike employment decisions on the basis of which employees were "working" during the strike.

rule we adopt. I would favor—and I believe Congress has provided for—the rule that errs on the side of preferring solidarity and seniority, rather than a rule that would permit the employer to discriminate on the basis of protected union activity.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins as to Parts I and II, dissenting.

The central question in this Railway Labor Act (RLA) case is whether it is unlawful for a carrier to refuse to reinstate employees who supported a strike until its end ("full-term strikers") solely because the carrier chooses to retain in its active work force employees who returned to work before the strike's conclusion ("crossovers").[1]

The Court today answers that question in the negative, concluding that such conduct never violates the RLA, regardless of whether business necessity dictated the carrier's course of action. In dissent, JUSTICE BRENNAN takes the diametrically opposite view, in agreement with the Court of Appeals. JUSTICE BRENNAN finds such conduct "inherently destructive," *ante*, at 443, of the right to strike and violative of the RLA regardless of any proffered business justification. In my view, neither of these positions accurately captures the delicate balance our RLA precedents have attempted to achieve between the public's dual interests in the maintenance of transportation service during labor disputes and in the long-term stability of labor relations in the rail and airline industries.

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[1] The question has been presented by the parties, and is stated by the Court, in terms of reinstatement of full-term strikers *with greater seniority*. For reasons explained in n. 6, *infra*, however, the question whether the final allocation of positions must be made on the basis of seniority is essentially remedial in nature. Cf. *Lone Star Industries, Inc.*, 279 N. L. R. B. 550 (1986) (employer is free to choose any nondiscriminatory means of making its poststrike reinstatement decisions). The question upon which liability turns is whether the basis of the allocation made (*i. e.*, the duration of the employee's support for the strike) was discriminatory.

My differences with JUSTICE BRENNAN are limited in scope. Concisely stated, I give greater weight than he does to the RLA's policy in favor of continued operations, and accordingly conclude that this case should be remanded to permit TWA to make a factual showing that its crossover policy truly was necessary for that purpose. The Court's opinion presents far greater concerns, as much because of the false assumptions that underlie the Court's analysis as because of its erroneous result.

I

The threshold question is whether the provisions and policies of the RLA place *any* limit on a carrier's exercise of self-help during a strike. The Court acknowledges that the RLA does contemplate such a limit. Indeed, there would be little need to distinguish, see *ante*, at 436, TWA's crossover policy from the superseniority policy in *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963), if the RLA had no relevance to the legality of grants of superseniority, or to other, even more egregious, discriminatory, and coercive employer practices. But the Court adopts a stingy interpretation of the RLA, reserving the RLA's protective force for only the most extraordinary circumstances. In so doing, the Court uses language which suggests that any limit on employer self-help must be "impl[ied]," *ante*, at 442, which in turn suggests that the Court finds no express limit in the text of the RLA. I find no basis for that view, a view which does not sit comfortably with the Court's opinion read as a whole and which results in a far too restrictive reading of the RLA.

When the Court addressed the permissible scope of employer self-help under the RLA in *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S. 369 (1969), it held that the RLA permits "parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, *so long as its use conflicts with no other obligation imposed by federal law.*" *Id.*, at 392 (emphasis

added). In applying that holding to the facts of this case, the Court rejects the proposition that § 2 Fourth of the RLA, 44 Stat. 577, as amended, 45 U. S. C. § 152 Fourth, creates a relevant conflicting federal obligation.

The Court's stated reason for rejecting the applicability of § 2 Fourth sweeps too broadly. The Court places great emphasis on the fact that the 1934 amendments which introduced § 2 Fourth had a "precertification focus." *Ante*, at 441. It should be clear, however, that a precertification focus is not the same as a postcertification blindspot. In 1934, Congress was faced with evidence that railroad employees' efforts at self-organization had been thwarted by coercive employer tactics, including the support of employer-dominated company unions. See *Machinists* v. *Street*, 367 U. S. 740, 759 (1961). Certainly, Congress had cause for concern: unless each side is free to choose its own bargaining representative, there can be no legitimate bargaining relationship. There is no indication, however, that Congress' concern in enacting § 2 Fourth is satisfied at the moment of a union's certification. Congress aimed to protect the employee's right to organize and join unions "with a view to asserting himself as to hours, conditions, and wages," 78 Cong. Rec. 11720 (1934) (remarks of Rep. Monaghan)—not as an end in itself. This Court long has recognized that a "primary purpose of the major revisions made in 1934 was to strengthen the position of the labor organizations vis-à-vis the carriers, to the end of furthering the success of the basic congressional policy of self-adjustment of the industry's labor problems." *Machinists* v. *Street*, 367 U. S., at 759.

Indeed, the Court today acknowledges that, precertification focus notwithstanding, § 2 Fourth has relevance to the right of employees to decide whether to assist in postcertification union activities, free from employer coercion. The Court places substantial reliance on § 2 Fourth as the source of "an employee's right to choose not to strike," *ante*, at 436,

a right relevant to this case only if it applies to *post*certification strike activity.

Finding § 2 Fourth to be a source of the right not to strike is entirely proper. In *Radio Officers* v. *NLRB*, 347 U. S. 17 (1954), the Court held that the protection § 8(a)(3) of the NLRA affords against employer discrimination "to . . . discourage membership in any labor organization," 29 U. S. C. § 158(a)(3), extends to "discrimination to discourage participation in union activities as well as to discourage adhesion to union membership." 347 U. S., at 40. I see no reason why similar language in § 2 Fourth, *i. e.*, its protection of employees' right to "join or remain or not to join or remain members of any labor organization," should not be read in a similar fashion. Cf. *Trainmen* v. *Jacksonville Terminal Co.*, 394 U. S., at 385, n. 20. Neither, apparently, does the Court. And if § 2 Fourth bars discrimination or retaliation against employees who choose *not* to strike, the same must be true of discrimination or retaliation against employees who choose *to* strike. See *Railway Labor Executives' Assn.* v. *Boston & Maine Corp.*, 808 F. 2d 150, 158 (CA1 1986), cert. denied, 484 U. S. 830 (1987); *Air Line Pilots Assn.* v. *United Air Lines, Inc.*, 802 F. 2d 886, 897 (CA7 1986), cert. denied, 480 U. S. 946 (1987).

In contrast, the Court's suggestion that the RLA provides employees no *express* protection against discrimination on the basis of levels of support for union activities leads the Court to limit the RLA's force to whatever protections this Court is willing to "imply" from the RLA's general policies. This uncertainty carries with it the danger of undermining the stability of labor relations under the RLA. Under this Court's longstanding RLA jurisprudence, a strike that takes place after the RLA's dispute resolution mechanisms have failed "represents only an interruption in the continuity of the relation" between employer and union, not an invitation for "labor-management relations [to] revert to the jungle." *Railway Clerks* v. *Florida East Coast R. Co.*, 384 U. S. 238,

246–247 (1966). Stated otherwise, a strike under the RLA is a "bounded conflict." Cf. Estreicher, Strikers and Replacements, 38 Lab. L. J. 287, 288 (1987). Contract negotiations are limited in scope to the matters raised by the parties' bargaining notices, see 45 U. S. C. § 156; both during and after strikes that occur following unsuccessful mediation, the union often will maintain its status as exclusive bargaining representative. See, *e. g.*, *Trans World Airlines, Inc.* v. *Independent Federation of Flight Attendants*, 809 F. 2d 483, 492 (CA8 1987), aff'd by equally divided Court, 485 U. S. 175 (1988). The long-term stability of labor relations thus will depend upon the maintenance of the working relationship between the union and the employer. This Court has been aware in the past that one party's power of self-help cannot be permitted effectively to negate the other's, lest "the right of self-help . . . become unilateral," *Railway Clerks* v. *Florida East Coast R. Co.*, 384 U. S. at 246, and that a carrier cannot be permitted to reap rewards from a strike so much in excess of the rewards of negotiation that it will "have a strong reason to prolong the strike and even break the union." *Id.*, at 247. The central emphasis of the RLA on continuity of labor relations requires courts to take the long view. See, *e. g.*, *Empresa Ecuatoriana de Aviacion* v. *District Lodge No. 100*, 690 F. 2d 838, 845 (CA11 1982), cert. dism'd, 463 U. S. 1250 (1983); *National Airlines, Inc.* v. *International Assn. of Machinists & Aerospace Workers*, 416 F. 2d 998, 1006 (CA5 1969).

The Court's position leaves far too little room for these concerns. By interpreting the RLA as affording protection to striking employees only in the most unusual circumstances, the Court encourages employers to test the limits, knowing that the burden will fall on the employees to demonstrate that the employer's conduct has crossed an artificially high barrier of "implied" tolerance for employer coercion. The Court thus needlessly creates incentives to undermine long-

term labor stability and to expand labor conflicts beyond their natural bounds.

In sum, this Court consistently has recognized that there is a difference between traditional self-help economic pressure and coercion or discrimination in derogation of federal law. The Court today continues to recognize this principle, and is willing to "imply" protection in extraordinary circumstances. But Congress did not leave the protection of employee rights to this Court's selective "implication." I reject this Court's failure to give full force to §2 Fourth, the RLA's express statutory prohibition of coercive and discriminatory employer conduct.

II

Even under the standards the Court articulates today, the result it reaches in this case cannot stand. The Court's conclusion that TWA's conduct cannot be said to violate the statutory rights (implied or otherwise) of full-term strikers fails to take seriously the significant discriminatory impact of TWA's refusal to reinstate full-term strikers. That failure rests on two assumptions that are patently inconsistent with central tenets of federal labor law.

First, the Court appears to suggest that because there were no "vacancies" for the full-term strikers to fill, employer "discrimination" cannot have been a factor in the final allocation of poststrike positions in the active work force. Contrary to this view, this Court long has held that the mere fact that a particular employee occupies a job at the conclusion of a strike does not entitle the employee to retain that job. This is illustrated by our NLRA precedents. Under *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347 (1938), an employer subject to the NLRA is "not bound to displace men hired to take the strikers' places in order to provide positions for them" if the employer has found it necessary to promise the replacements permanent employment in

order to operate during the strike.[2] In contrast, positions occupied by new hires to whom *no* promise of "permanent replacement" status is made are as good as "vacancies" from the full-term strikers' point of view. The employer's legal right to resist a union demand for reinstatement flows from the necessity of the offer of permanence; absent such necessity, the employer may be required to furlough (or discharge) the replacements to make room for the strikers' return. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S. 375, 378–379 (1967); *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 514, 517 (1983) (opinion concurring in judgment). The poststrike situation is not, in short, a game of musical chairs: it is governed not by the rule of capture, but by conflicting claims of legal entitlement.

Second, and in tacit recognition that the poststrike situation is governed by law rather than by force or happenstance, the Court elevates the rights of crossovers to the preeminent position, a position which in the Court's view flows naturally from the RLA's and NLRA's protection of "an employee's right to choose not to strike." *Ante*, at 436. From the fact that some employees will disagree with the union's decision to strike, the Court deduces the proposition that "employees who chose not to gamble on the success of the strike" should not "suffer the consequences when the gamble proves unsuccessful." *Ante*, at 438.

The Court's analysis entirely ignores, and threatens to vitiate, the "'majority-rule concept [that] is today unquestionably at the center of our federal labor policy.'" *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175, 180 (1967), quoting Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327, 1333 (1958). "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed

[2] The employer, of course, may agree to discharge permanent replacements, subject to any claims the replacements may have under state law. See *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 496–497, 500 (1983).

by a legislative body both to create and restrict the rights of those whom it represents." *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 202 (1944) (discussing the duty of fair representation). What the Court characterizes as "*their union's* decision to strike," *ante*, at 437 (emphasis added), is the decision reached by the majority of the members of the bargaining unit through democratic processes. The right to remain a member of the collectivity but to opt out of the consequences of particular collective decisions when the going gets rough is not a normal incident of participation in the democratic process.

The Court also overlooks the long-recognized fact that the benefits of successful union activity flow to all members of the bargaining unit regardless of their personal support for the union. See *Railway Employees* v. *Hanson*, 351 U. S. 225, 238 (1956); *Machinists* v. *Street*, 367 U. S., at 762. By elevating the right of crossovers to be "free rider[s]," *id.*, at 762–763, nn. 13 and 14, to the status of a first principle of labor law, the Court forgets that, by definition, the benefits and burdens of collective action are borne collectively.

This newly asserted statutory right of dissidents to be free from the consequences of collective action buckles under the heavy load the Court asks it to bear. As TWA concedes and the Court recognizes, employers and unions often lawfully agree to displace crossovers through poststrike back-to-work agreements, and employers may unilaterally decide to permit such displacement. See Brief for Petitioner 29; see also *Copaz Packing Corp.*, 115 LRRM 1008, 1008 (1983) (NLRB General Counsel Advice Memorandum) (employers are "privileged to enter into a strike settlement which provide[s] that . . . crossovers and strikers who remained on strike until the settlement would be treated equally for recall purposes"); *Florida East Coast R. Co.*, 41 Lab. Arb. 1001, 1006–1007 (1963) (recommendation of Presidential Emergency Board that the carrier replace crossovers and new-hire replacements, who were the poststrike "occupants of the jobs cov-

ered by agreements between the Carrier and the organizations with striking employees to the extent necessary to permit these jobs to be filled on the basis of seniority"). If the right of dissidents to be free of the economic consequences of strikes is so central, it is difficult to see why the union has the power to bargain it away or why the employer has the power to ignore it.

In sum, the Court concludes that TWA's conduct was lawful on the basis of two assumptions: that the resulting job distribution is justified by the absence of "vacancies" for the returning strikers, and that TWA's acts were a necessary consequence of its duty to respect the crossovers' statutory right not to strike. The Court allows these assumptions to stand in the way of considering the adverse impact of TWA's actions on the full-term strikers' statutory rights. But I find these assumptions to be without foundation, and thus turn to the question the Court fails to reach.

III

A

At the conclusion of the strike, TWA refused to reinstate full-term strikers to positions then occupied by crossovers. In analyzing the lawfulness of TWA's conduct, certain NLRA principles provide a useful starting point. This Court has recognized under the NLRA that an employer's refusal to reinstate striking employees discourages employees from exercising their right to organize and to strike, *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S., at 378, and violates the statutory prohibition against discrimination "unless the employer . . . can show that his action was due to 'legitimate and substantial business justifications.'" *Ibid.*, quoting *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26, 34 (1967). If the employer fails to meet this burden, the inquiry is at an end. Furthermore, in certain circumstances, "the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business consider-

ations," *id.*, at 34, by striking "'the proper balance between the asserted business justifications and the invasion of employee rights.'" *Metropolitan Edison Co.* v. *NLRB*, 460 U. S. 693, 703 (1983), quoting *Great Dane*, 388 U. S., at 33–34.[3]

These basic principles are consistent with our RLA precedents. In *Railway Clerks* v. *Florida East Coast R. Co.*, 384 U. S. 238 (1966), the carrier, during a strike, resorted to self-help in facial violation of § 2 Seventh of the RLA, which prohibits unilateral changes in terms and conditions of employment embodied in collective agreements. The Court held that the carrier could not fulfill its duty to the public to make reasonable efforts to maintain service during the strike if § 2 Seventh were applied with full force during strikes. To accommodate the public interest in continued service, it inter-

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[3] Under § 8(a)(3) of the NLRA, 29 U. S. C. § 158(a)(3), the employer's motive is relevant to the analysis. See *Metropolitan Edison Co.* v. *NLRB*, 460 U. S. 693, 700 (1983); see generally Christensen & Svanoe, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 Yale L. J. 1269 (1968). The motive inquiry does not arise, however, unless the employer is able to demonstrate business justification for his actions. At that point, the course of the inquiry varies depending upon the severity of the adverse impact of the employer's conduct on employee rights. Where the impact is relatively slight, the employer's conduct will be deemed lawful unless the union proves that the employer's conduct was motivated by antiunion animus. See *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S., at 34. Where, in contrast, the impact is sufficiently severe to render the employer's conduct "'inherently destructive' of important employee rights," *ibid.*, antiunion motive may be inferred from the conduct itself. See *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 228, 231 (1963).

To decide this case, it is not necessary to resolve the question whether antiunion motive is a necessary element of a § 2 Fourth violation. I think it clear that the crossover policy at issue here is "inherently destructive" of employee rights: it is sufficiently destructive not to require an express showing of antiunion motive even under the motive-based standards of § 8(a)(3). For this same reason, I note, TWA's conduct falls afoul of the RLA under the "inherently destructive" standard set forth by the Court in this case. See *ante*, at 442.

preted the RLA as granting the carrier a "closely confined and supervised" power to alter the terms of the agreement during a strike in order to continue service under the particular strike conditions presented by that case. 384 U. S., at 246. The appropriate standard for reviewing a carrier's alteration of an agreement, the Court concluded, was adequately captured by the words "reasonably necessary," "provided that 'reasonably necessary' is construed strictly" to mean "only such changes as are truly necessary . . . for the continued operation" of the carrier. *Id.*, at 248.

In this case, we address conduct that facially violates a different provision of the RLA: § 2 Fourth's bar against conduct by a carrier which, by its natural tendency, induces or influences employees in their decisions to support or refrain from supporting union activities. The logic of *Florida East Coast R. Co.*, however, is equally applicable here and suggests that a carrier's refusal to reinstate strikers—conduct which, on its face, violates § 2 Fourth because of its tendency to influence adversely employees' willingness to support strikes—is unlawful if the refusal was not truly necessary for the continued operation of the carrier during the strike.

In my view, there is no basis under the RLA for a presumption that offers of permanence are necessary in order to induce crossovers and outside replacements to work during a strike. Cf. *Hot Shoppes, Inc.*, 146 N. L. R. B. 802, 805 (1964); *Belknap, Inc.* v. *Hale*, 463 U. S., at 504, n. 8 (discussing presumptive necessity of offers of permanence to outside replacements under the NLRA). The Court recognized in *Florida East Coast R. Co.*, 384 U. S., at 246, that a carrier may have need to "improvis[e] and emplo[y] an emergency labor force" in order to continue operations. Under the RLA, as under the NLRA, in short, the Court has recognized that the employer has "the right to protect and continue his business by supplying places left vacant by strikers." *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S., at 345. The Union does not here dispute that proposition,

nor does it question that RLA employers may offer new hires "permanent" status. Cf. *id.*, at 346. But this Court has also recognized that the public has an interest in the long-term stability of labor relations in industries governed by the RLA. See *Virginian R. Co.* v. *Railway Employees*, 300 U. S. 515, 552 (1937). A rule that presumes that replacements and crossovers must be offered permanence would needlessly infringe on that interest in stability.

> "There may be some who will . . . argu[e] that employees must take their chances on being permanently replaced when they elect to go on strike. There is little doubt that striking employees have lost their jobs in many firms through the application of this principle. On the other hand, we are concerned in this case not with an ordinary private business but with a common carrier in an industry vital to the public. . . . Experience suggests that the prospects for achieving a 'peaceable settlement' of this dispute will remain in jeopardy so long as the striking employees are prevented from working by the presence of the newly-hired replacements. While this situation persists, the organizations can be expected to employ every legitimate means to put pressure on the company to reinstate the strikers. Controversy of this kind may interfere with the legitimate needs of passengers and shippers . . . . Moreover, other railroads may be tempted to follow the example of this carrier, thus provoking bitter and disruptive disputes in other sections of the country." *Florida East Coast R. Co.*, 41 Lab. Arb., at 1006–1007.

This risk should be taken only if absolutely necessary to the carrier's continued operations. Presuming the need does gratuitous damage to significant statutory interests.[4]

[4] Count 2 of the union's complaint seeks "to establish that it was not necessary for TWA to offer permanent jobs to the replacements hired from outside the pre-strike workforce and that TWA therefore violated the RLA by doing so." Brief for Respondent 3, n. 5; see App. to Pet. for

B

In his dissent, JUSTICE BRENNAN does not reach the question whether a carrier who offers permanence to replacements and crossovers is entitled to a presumption of business necessity. Indeed, he would not even *permit* TWA to make a case-specific showing that its crossover policy was necessary for its continued operation during the strike. Here, our positions differ: I would require the carrier to prove the business necessity of offering permanence to replacements and crossovers on the facts of each case.[5]

Cert. 55a–56a. That claim has not yet been tried and remains pending. See Tr. of Oral Arg. 42. The union has explained that Count 2 of the complaint, as drafted, proceeds on the theory that the employer is entitled to a *rebuttable* presumption that an offer of permanence is necessary for continued operation. Brief for Respondent 39. The union takes the position that although "there may well be a basis for erecting a presumption that offers of permanence to outside replacements are 'truly necessary' in order to operate during a strike and placing the burden to prove otherwise on the injured full-term strikers or their union, there is no basis for any such presumption with regard to crossovers." *Ibid.* (footnote omitted). I agree with the union that there is less basis for presuming the necessity of an offer of permanence in the case of crossovers than in the case of outside replacements. But, as indicated in the text, I would go further: I see no need to afford the carrier the benefit of a rebuttable presumption of business necessity even in the case of outside replacements.

[5] Adopting a uniform standard applicable to both outside replacements and crossovers disposes of the argument that to permit full-term strikers to displace crossovers would have the anomalous result of treating crossovers more harshly than permanent replacements. *Ante*, at 434, 436; see Tr. of Oral Arg. 43. In a particular case, members of the prestrike work force may well return to work solely because they can no longer endure the present economic costs of the strike, and will do so without further inducement. If the carrier also needs to hire outside replacements, and legitimately finds that it can do so only by promising them that they will not be laid off to make room for returning strikers, the result in that case will be that the crossovers will have less protection from layoff than will the new hires. This result is not anomalous, however; it is merely the result of applying a uniform standard to disparate facts.

JUSTICE BRENNAN rests his contrary position on *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963). In that case, an employer granted 20 years' superseniority to employees (new hires and crossovers) who had worked during a strike, which later placed reinstated full-term strikers at a substantial and long-term risk of layoff. There, the NLRB found, and this Court agreed, that "the employer's insistence that its overriding purpose in granting super-seniority was to keep its plant open and that business necessity justified its conduct was unacceptable since 'to excuse such conduct would greatly diminish, if not destroy, the right to strike guaranteed by the Act.'" *Id.*, at 225–226 (quoting *Erie Resistor Corp.*, 132 N. L. R. B. 621, 630 (1961)). Because the Court concluded that the stated business justification would not outweigh the asserted interest in continued operation, no factual inquiry into whether the employer's claim that he could not otherwise have operated during the strike was held to be necessary.

Two considerations cause me to part ways with JUSTICE BRENNAN's conclusion. First, it is not so clear to me as it is to JUSTICE BRENNAN, *ante* at 449, that TWA's conduct in this case is sufficiently egregious for its destructive impact to outweigh the interest in maintaining operations during the strike. In *Erie Resistor*, this Court identified a number of factors that made grants of superseniority particularly harmful to employee rights. Several, but not all, of those factors are present in this case. TWA's conduct, like the conduct at issue in *Erie Resistor*, induces employees to abandon the strike and particularly harms full-term strikers. See 373 U. S., at 230–231. But in *Erie Resistor* the Court stressed the fact that, for years after the strike, reinstated strikers would face a greater risk of layoff because of the additional seniority given to those who worked during the strike. Although *Erie Resistor* does not suggest an overarching principle identifying which factors are dispositive, the absence of a

similar continued threat of loss of employment suggests to me that the crossover policy at issue here is not so destructive of employee rights as was the superseniority policy at issue in *Erie Resistor*. The fact that the Court struck the balance against the employer in *Erie Resistor* is thus not dispositive of this case.

Second, and more generally, I am concerned that a standard that permits courts to balance employer and employee interests in the abstract, without a concrete evidentiary record, will lead to erroneous results that endanger the unique statutory interests embodied in the RLA. In the past we have recognized that the public has a significant interest in the continuity of transportation services during labor disputes, and that the RLA protects that interest. Railroad and airline industry employers, we have held, must make "reasonable efforts to maintain the public service at all times, even when beset by labor-management controversies." *Florida East Coast R. Co.*, 384 U. S., at 245. I recognize that we have stopped short of holding that federal law imposes an absolute duty to operate during strikes, see *id.*, at 250 (WHITE, J., dissenting), and thus have never held that the interest in continued operation cannot be outweighed by other concerns. In my view, however, the balance should be struck on a case-by-case basis and upon a factual record. I expect that it will be a rare case in which gravely destructive carrier conduct will be *proved* necessary to continued operation under the strict standard of necessity established by *Florida East Coast*. The ultimate question as to which interest should prevail in such a case is one we can afford to leave unanswered until it is presented on proper facts.

IV

Because the Court of Appeals found TWA's conduct unlawful without considering whether TWA's crossover policy was "truly necessary" for continued operations during the strike, I would vacate the judgment of the Court of Appeals and di-

rect that court to remand the case for consideration of that issue.[6] Inasmuch as this Court is now reversing outright, I dissent.

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[6] If it proved to be the case on remand that TWA's crossover policy was indeed unlawful, the question (noted at n. 1, *supra*) would arise whether the union is entitled to the specific relief it seeks: the allocation of positions in the active work force on the basis of seniority. This Court suggested in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 347 (1938), and the NLRB held in *Lone Star Industries*, 279 N. L. R. B. 550 (1986), that an employer may make its poststrike reinstatement decisions on the basis of *any* nondiscriminatory criterion. Because "[i]t is universally recognized, as a matter of sound labor relations, that seniority provides the employee with an equitable interest in continued employment," *Florida East Coast R. Co.* 41 Lab. Arb. 1001, 1006 (1963), seniority is likely to be the neutral criterion of choice. Indeed, TWA unilaterally implemented a settlement proposal calling for reinstatement of full-term strikers to "vacancies" in seniority order. See App. 90–91; App. to Pet. for Cert. 52a–53a (Complaint ¶ 28).

Although this unilateral undertaking may well bind TWA at the remedial stage of this litigation, I note that the union has not based its entitlement to seniority-based relief on that ground. Nor has the union argued (at least explicitly) that specific provisions of its collective-bargaining agreement require that result. Cf. *Eastern Air Lines, Inc.*, 48 Lab. Arb. 1005 (1967) (interpreting general seniority provisions of collective-bargaining agreement as applicable to poststrike reinstatement). Rather, the union's argument for a seniority-based remedy appears to be purely statutory in nature. There is some merit to the view that the bounded nature of strikes under the RLA requires that seniority be used as the mechanism for poststrike reinstatement because it will achieve the closest possible approximation of the prestrike work force. But there is some danger that imposing seniority-based reinstatement as a statutory matter would place courts in the position of expanding contractual seniority provisions beyond their contemplated scope. In light of the likelihood that TWA would voluntarily employ seniority as a basis for its reinstatement decisions on remand, this question need not be reached.

VOLT INFORMATION SCIENCES, INC. *v.* BOARD OF TRUSTEES OF LELAND STANFORD JUNIOR UNIVERSITY

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT

No. 87–1318. Argued November 30, 1988—Decided March 6, 1989

A construction contract between appellant and appellee contained an agreement to arbitrate all disputes arising out of the contract and a choice-of-law clause providing that the contract would be governed by the law of "the place where the Project is located." When a dispute arose under the contract, appellant made a formal demand for arbitration. In response, appellee filed an action against appellant in the California Superior Court alleging fraud and breach of contract; in the same action, appellee sought indemnity from two other parties involved in the construction project, with whom it did not have arbitration agreements. The trial court denied appellant's motion to compel arbitration and granted appellee's motion to stay arbitration under Cal. Civ. Proc. Code Ann. § 1281.2(c), which allows such a stay pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it. The State Court of Appeal affirmed, holding that (1) by specifying that the contract would be governed by "the law of the place where the Project is located," the choice-of-law clause incorporated the California rules of arbitration, including § 1281.2(c), into the parties' arbitration agreement, and (2) application of § 1281.2(c) was not preempted by the Federal Arbitration Act (FAA or Act), even though the contract involved interstate commerce.

Held:

1. The Court of Appeal's conclusion that the parties intended the choice-of-law clause to incorporate the California arbitration rules into their arbitration agreement is a question of state law, which this Court will not set aside. Pp. 474–476.

(a) Appellant's contention that the state court's construction of the choice-of-law clause was in effect a finding that appellant had "waived" its federally guaranteed right to compel arbitration, a waiver whose validity must be judged by reference to federal rather than state law, fundamentally misconceives the nature of the rights created by the FAA. Section 4 of that Act does not confer an absolute right to compel arbitration, but only a right to obtain an order directing that "arbitration proceed *in the manner provided for in [the parties'] agreement.*" (Emphasis

added.) Here, the state court found that, by incorporating California arbitration rules into their agreement, the parties had agreed that arbitration would not proceed in situations within the scope of § 1281.2(c). This was not a finding that appellant had "waived" an FAA-guaranteed right to compel arbitration, but a finding that it had no such right in the first place, because the parties' agreement did not require arbitration to proceed in this situation. Pp. 474–475.

(b) Also without merit is appellant's argument that the state court's construction of the choice-of-law clause must be set aside because it violates the settled federal rule that questions of arbitrability in contracts subject to the FAA must be resolved with a healthy regard for the federal policy favoring arbitration. See *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 24–25. There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable the California arbitration rules—which are manifestly designed to encourage resort to the arbitral process—does not offend *Moses H. Cone*'s rule of liberal construction. Pp. 475–476.

2. Application of § 1281.2(c) to stay arbitration under the parties' contract is not pre-empted by the FAA. The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. Moreover, since the FAA's principal purpose is to ensure that private arbitration agreements are enforced according to their terms, it cannot be said that application of § 1281.2(c) here would undermine the Act's goals and policies. Arbitration under the Act in a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 628, so too may they specify by contract the rules under which the arbitration will be conducted. Where, as here, the parties have agreed to abide by state arbitration rules, enforcing those rules according to the terms of the agreement is fully consistent with the FAA's goals, even if the result is that arbitration is stayed when the Act would otherwise permit it to go forward. Pp. 476–479.

Affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 479. O'CONNOR, J., took no part in the consideration or decision of the case.

James E. Harrington argued the cause for appellant. With him on the briefs were *Robert B. Thum* and *Deanne M. Tully*.

David M. Heilbron argued the cause for appellee. With him on the brief was *Leslie G. Landau*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Unlike its federal counterpart, the California Arbitration Act, Cal. Civ. Proc. Code Ann. § 1280 *et seq.* (West 1982), contains a provision allowing a court to stay arbitration pending resolution of related litigation. We hold that application of the California statute is not pre-empted by the Federal Arbitration Act (FAA or Act), 9 U. S. C. § 1 *et seq.*, in a case where the parties have agreed that their arbitration agreement will be governed by the law of California.

Appellant Volt Information Sciences, Inc. (Volt), and appellee Board of Trustees of Leland Stanford Junior University (Stanford) entered into a construction contract under which Volt was to install a system of electrical conduits on the Stanford campus. The contract contained an agreement to arbitrate all disputes between the parties "arising out of or relating to this contract or the breach thereof."[1] The contract also contained a choice-of-law clause providing that "[t]he Contract shall be governed by the law of the place where the Project is located." App. 37. During the course of the project, a dispute developed regarding compensation for extra work, and Volt made a formal demand for arbitration. Stanford responded by filing an action against Volt

[1] The arbitration clause read in full as follows:

"All claims, disputes and other matters in question between the parties to this contract, arising out of or relating to this contract or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then prevailing unless the parties mutually agreed *[sic]* otherwise. . . . This agreement to arbitrate . . . shall be specifically enforceable under the prevailing arbitration law." App. 40.

in California Superior Court, alleging fraud and breach of contract; in the same action, Stanford also sought indemnity from two other companies involved in the construction project, with whom it did not have arbitration agreements. Volt petitioned the Superior Court to compel arbitration of the dispute.[2] Stanford in turn moved to stay arbitration pursuant to Cal. Civ. Proc. Code Ann. § 1281.2(c) (West 1982), which permits a court to stay arbitration pending resolution of related litigation between a party to the arbitration agreement and third parties not bound by it, where "there is a possibility of conflicting rulings on a common issue of law or fact."[3] The Superior Court denied Volt's motion to compel arbitration and stayed the arbitration proceedings pending the outcome of the litigation on the authority of § 1281.2(c). App. 59–60.

The California Court of Appeal affirmed. The court acknowledged that the parties' contract involved interstate

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[2] Volt's motion to compel was apparently brought pursuant to § 4 of the FAA, 9 U. S. C. § 4, and the parallel provision of the California Arbitration Act, Cal. Civ. Proc. Code Ann. § 1281.2 (West 1982); the motion cited both Acts as authority, but did not specify the particular sections upon which reliance was placed. App. 45–46. Volt also asked the court to stay the Superior Court litigation until the arbitration was completed, presumably pursuant to § 3 of the FAA, 9 U. S. C. § 3, and the parallel provision of the California Arbitration Act, Cal. Civ. Proc. Code Ann. § 1281.2(c)(3) (West 1982). App. 45–46.

[3] Section 1281.2(c) provides, in pertinent part, that when a court determines that "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact[,] . . . the court (1) may refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; (2) may order intervention or joinder as to all or only certain issues; (3) may order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or (4) may stay arbitration pending the outcome of the court action or special proceeding."

commerce, that the FAA governs contracts in interstate commerce, and that the FAA contains no provision permitting a court to stay arbitration pending resolution of related litigation involving third parties not bound by the arbitration agreement. App. 64–65. However, the court held that by specifying that their contract would be governed by "'the law of the place where the project is located,'" the parties had incorporated the California rules of arbitration, including § 1281.2(c), into their arbitration agreement. *Id.*, at 65. Finally, the court rejected Volt's contention that, even if the parties had agreed to arbitrate under the California rules, application of § 1281.2(c) here was nonetheless pre-empted by the FAA because the contract involved interstate commerce. *Id.*, at 68–80.

The court reasoned that the purpose of the FAA was "'not [to] mandate the arbitration of all claims, but merely the enforcement . . . of privately negotiated arbitration agreements.'" *Id.*, at 70 (quoting *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 219 (1985)). While the FAA therefore pre-empts application of state laws which render arbitration agreements unenforceable, "[i]t does not follow, however, that the federal law has preclusive effect in a case where the parties have chosen in their [arbitration] agreement to abide by state rules." App. 71. To the contrary, because "[t]he thrust of the federal law is that arbitration is strictly a matter of contract," *ibid.*, the parties to an arbitration agreement should be "at liberty to choose the terms under which they will arbitrate." *Id.*, at 72. Where, as here, the parties have chosen in their agreement to abide by the state rules of arbitration, application of the FAA to prevent enforcement of those rules would actually be "inimical to the policies underlying state and federal arbitration law," *id.*, at 73, because it would "force the parties to arbitrate in a manner contrary to their agreement." *Id.*, at 65. The California Supreme

Court denied Volt's petition for discretionary review. *Id.*, at 87. We postponed consideration of our jurisdiction to the hearing on the merits. 485 U. S. 976 (1988). We now hold that we have appellate jurisdiction[4] and affirm.

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[4] Under 28 U. S. C. § 1257(2), this Court has appellate jurisdiction to review a final judgment rendered by the highest court of a State in which a decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." Here appellant explicitly drew in question the validity of Cal. Civ. Proc. Code Ann. § 1281.2(c) (West 1982) on federal grounds, contending that the statute, as applied to stay arbitration of this dispute, was pre-empted by the FAA and thus invalid under the Supremacy Clause. Because the California Court of Appeal upheld application of the statute against this challenge, our appellate jurisdiction would seem to be assured. See *Longshoremen* v. *Davis*, 476 U. S. 380, 387, n. 8 (1986) (§ 1257(2) jurisdiction exists when a state statute is upheld against a claim that its application to a particular set of facts is pre-empted by federal law); *McCarty* v. *McCarty*, 453 U. S. 210, 219–220, n. 12 (1981) (same). Appellee contends, however, that § 1257(2) jurisdiction does not exist because the Court of Appeal's decision did not directly address the validity of the statute itself, but "simply uph[eld] the validity of the parties' agreement," which in turn required application of the statute. Brief for Appellee 4. Because an agreement is not a "statute," appellee argues, the Court of Appeal's decision is not one from which an appeal under § 1257(2) will lie. *Id.*, at 4–5.

We disagree. Our decisions establish that "a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434, 441 (1979) (citing *Cohen* v. *California*, 403 U. S. 15, 17–18 (1971); *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U. S. 685, 686, and n. 1 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 61, n. 3 (1963); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 288–290 (1921)), regardless of "the particular grounds or reasons on which the [state court's] decision is put." *Id.*, at 289. In this case, appellant contended before the Court of Appeal that even if the contract required application of Cal. Civ. Proc. Code Ann. § 1281.2(c) (West 1982), the California statute, as applied to stay arbitration under this contract in interstate commerce, so conflicted with the FAA that it was invalid under the Supremacy Clause. The Court of Appeal upheld application of the statute against this chal-

Appellant devotes the bulk of its argument to convincing us that the Court of Appeal erred in interpreting the choice-of-law clause to mean that the parties had incorporated the California rules of arbitration into their arbitration agreement. See Brief for Appellant 66–96. Appellant acknowledges, as it must, that the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review. See *id.*, at 26, 29. But appellant nonetheless maintains that we should set aside the Court of Appeal's interpretation of this particular contractual provision for two principal reasons.

Appellant first suggests that the Court of Appeal's construction of the choice-of-law clause was in effect a finding that appellant had "waived" its "federally guaranteed right to compel arbitration of the parties' dispute," a waiver whose validity must be judged by reference to federal rather than state law. *Id.*, at 17, 30–36. This argument fundamentally misconceives the nature of the rights created by the FAA. The Act was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate," *Byrd*, *supra*, at 219–220, and place such agreements "'upon the same footing as other contracts,'" *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 511 (1974) (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)). Section 2 of the Act therefore declares that a written agreement to arbitrate in any contract involving interstate commerce or a maritime transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U. S. C. § 2, and § 4 allows a party to such an arbitration agreement to "petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."

But § 4 of the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the

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lenge, and under *Dahnke-Walker* and its progeny, that was sufficient to bring the case within the terms of § 1257(2), even though the court's decision may have been premised on its interpretation of the contract.

right to obtain an order directing that "arbitration proceed *in the manner provided for in [the parties'] agreement.*" 9 U. S. C. § 4 (emphasis added). Here the Court of Appeal found that, by incorporating the California rules of arbitration into their agreement, the parties had agreed that arbitration would not proceed in situations which fell within the scope of Calif. Code Civ. Proc. Ann. § 1281.2(c) (West 1982). This was not a finding that appellant had "waived" an FAA-guaranteed right to compel arbitration of this dispute, but a finding that it had no such right in the first place, because the parties' agreement did not require arbitration to proceed in this situation. Accordingly, appellant's contention that the contract interpretation issue presented here involves the "waiver" of a federal right is without merit.

Second, appellant argues that we should set aside the Court of Appeal's construction of the choice-of-law clause because it violates the settled federal rule that questions of arbitrability in contracts subject to the FAA must be resolved with a healthy regard for the federal policy favoring arbitration. Brief for Appellant 49–52; *id.*, at 92–96, citing *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 24–25 (1983) (§ 2 of the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act," which requires that "questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration," and that "any doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration"); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614, 626 (1985) (in construing an arbitration agreement within the coverage of the FAA, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability"). These cases of course establish that, in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, see *Perry* v. *Thomas*, 482 U. S. 483, 493, n. 9 (1987),

due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.

But we do not think the Court of Appeal offended the *Moses H. Cone* principle by interpreting the choice-of-law provision to mean that the parties intended the California rules of arbitration, including the § 1281.2(c) stay provision, to apply to their arbitration agreement. There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to encourage resort to the arbitral process—simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.[5]

The question remains whether, assuming the choice-of-law clause meant what the Court of Appeal found it to mean, application of Cal. Civ. Proc. Code Ann. § 1281.2(c) is nonetheless pre-empted by the FAA to the extent it is used to stay arbitration under this contract involving interstate commerce. It is undisputed that this contract falls within the coverage of the FAA, since it involves interstate commerce, and that the FAA contains no provision authorizing a stay of arbitration in this situation. Appellee contends, however, that §§ 3 and 4 of the FAA, which are the specific sections

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[5] Unlike the dissent, see *post* at 486–487, we think the California arbitration rules which the parties have incorporated into their contract generally foster the federal policy favoring arbitration. As indicated, the FAA itself contains no provision designed to deal with the special practical problems that arise in multiparty contractual disputes when some or all of the contracts at issue include agreements to arbitrate. California has taken the lead in fashioning a legislative response to this problem, by giving courts authority to consolidate or stay arbitration proceedings in these situations in order to minimize the potential for contradictory judgments. See Calif. Civ. Proc. Code Ann. § 1281.2(c).

claimed to conflict with the California statute at issue here, are not applicable in this state-court proceeding and thus cannot pre-empt application of the California statute. See Brief for Appellee 43–50. While the argument is not without some merit,[6] we need not resolve it to decide this case, for we conclude that even if §§ 3 and 4 of the FAA are fully applicable in state-court proceedings, they do not prevent application of Cal. Civ. Proc. Code Ann. § 1281.2(c) to stay arbitration where, as here, the parties have agreed to arbitrate in accordance with California law.

The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. See *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956) (upholding application of state arbitration law to arbitration provision in contract not covered by the FAA). But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). The question before us, therefore, is whether application of Cal. Civ. Proc. Code Ann. § 1281.2(c) to stay arbitration under this contract in interstate commerce, in accordance with the terms of the arbitration agreement itself,

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[6] While we have held that the FAA's "substantive" provisions—§§ 1 and 2—are applicable in state as well as federal court, see *Southland Corp.* v. *Keating*, 465 U. S. 1, 12 (1984), we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, see 9 U. S. C. § 3 (referring to proceedings "brought in any of the courts of the United States"); § 4 (referring to "any United States district court"), are nonetheless applicable in state court. See *Southland Corp* v. *Keating*, *supra*, at 16, n. 10 (expressly reserving the question whether "§§ 3 and 4 of the Arbitration Act apply to proceedings in state courts"); see also *id.*, at 29 (O'CONNOR, J., dissenting) (§§ 3 and 4 of the FAA apply only in federal court).

would undermine the goals and policies of the FAA. We conclude that it would not.

The FAA was designed "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate," *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S., at 219–220, and to place such agreements "'upon the same footing as other contracts,'" *Scherk* v. *Alberto-Culver Co.*, 417 U. S., at 511 (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)). While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered." *Byrd*, 470 U. S., at 220. Accordingly, we have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so, see *id.*, at 219 (the Act "does not mandate the arbitration of all claims"), nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement, see *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S., at 628 (citing *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 406 (1967)). It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. See *Prima Paint*, *supra*, at 404, n. 12 (the Act was designed "to make arbitration agreements as enforceable as other contracts, but not more so").

In recognition of Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms, we have held that the FAA pre-empts state laws which "require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp.* v. *Keating*, 465 U. S. 1, 10 (1984). See, *e. g.*, *id.*, at 10–16 (finding pre-empted a state statute which rendered agreements to arbitrate certain franchise claims unenforceable); *Perry* v. *Thomas*, 482 U. S., at 490 (finding pre-empted a state statute which rendered unen-

forceable private agreements to arbitrate certain wage collection claims). But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, see *Mitsubishi*, *supra*, at 628, so too may they specify by contract the rules under which that arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, see *Byrd*, *supra*, at 221, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The litigants in this case were parties to a construction contract which contained a clause obligating them to arbitrate disputes and making that obligation specifically enforceable. The contract also incorporated provisions of a standard form contract prepared by the American Institute of Architects and endorsed by the Associated General Contractors of America; among these general provisions was § 7.1.1: "The

Contract shall be governed by the law of the place where the Project is located."[1] When a dispute arose between the parties, Volt invoked the arbitration clause, while Stanford attempted to avoid it (apparently because the dispute also involved two other contractors with whom Stanford had no arbitration agreements).

The Federal Arbitration Act (FAA), 9 U. S. C. § 1 *et seq.*, requires courts to enforce arbitration agreements in contracts involving interstate commerce. See *ante*, at 474. The California courts nonetheless rejected Volt's petition to compel arbitration in reliance on a provision of state law that, in the circumstances presented, permitted a court to stay arbitration pending the conclusion of related litigation. Volt, not surprisingly, suggested that the Supremacy Clause compelled a different result. The California Court of Appeal found, however, that the parties had agreed that their contract would be governed solely by the law of the State of California, to the exclusion of federal law.[2] In reaching this

[1] American Institute of Architects Document A201, General Conditions of the Contract for Construction § 7.1.1 (1976). See App. 40.

[2] The California Court of Appeal correctly assumed that the FAA, were it applicable, would pre-empt the provisions of Cal. Civ. Proc. Code Ann. § 1281.2(c) (West 1982): "[I]t is apparent that were the federal rules to apply, Volt's petition to compel arbitration would have to be granted." App. 65.

Stanford nonetheless attempts to cast doubt on this conclusion by arguing that §§ 3 and 4 of the FAA, which provide for court orders to stay litigation and to compel arbitration, are not applicable in state court. Brief for Appellee 43–50. While we have stated that "state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act," *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 26 (1983); see also *id.*, at 26, nn. 34–35, it is immaterial to the resolution of this case whether §§ 3 and 4 actually "apply." The parties here not only agreed to arbitrate, but they also agreed that that agreement would be specifically enforceable. See *ante*, at 470, n. 1. FAA § 2—which indisputably does apply in state court, *Southland Corp.* v. *Keating*, 465 U. S. 1 (1984)—requires the court to enforce the parties' agreement. (Indeed, *Southland Corp.* can be read to stand for the proposition that § 2 makes *all* arbitration agreements specifically enforceable. See

conclusion the court relied on no extrinsic evidence of the parties' intent, but solely on the language of the form contract that the "'law of the place where the project is located'" would govern. App. 66–67.[3]

This Court now declines to review that holding, which denies effect to an important federal statute, apparently because it finds no question of federal law involved. I can accept neither the state court's unusual interpretation of the parties' contract, nor this Court's unwillingness to review it. I would reverse the judgment of the California Court of Appeal.[4]

I

Contrary to the Court's view, the state court's construction of the choice-of-law clause is reviewable for two independent reasons.

A

The Court's decision not to review the state court's interpretation of the choice-of-law clause appears to be based on the principle that "the interpretation of private contracts is ordinarily a question of state law, which this Court does

id., at 31, and n. 20 (O'CONNOR, J., dissenting).) To stay the arbitration proceedings pending litigation of the same issues, as § 1281.2(c) provides, is not compatible with specific enforcement of the agreement to arbitrate—which is what the FAA requires here. Section 1281.2(c) therefore cannot be given effect unless—as the California Court of Appeal held—the parties somehow agreed that federal law was to play no role in governing their contract.

[3] The court held that "the word 'place' was intended to mean the forum state." App. 66. It added: "We do not find reasonable Volt's interpretation that the 'place' where the project is located be construed to mean not only the state of California but also the nation of the United States of America." *Id.*, at 67.

[4] I do not disagree with the Court's holding, *ante*, at 477–479, that the FAA does not pre-empt state arbitration rules, even as applied to contracts involving interstate commerce, when the parties have agreed to arbitrate by those rules to the exclusion of federal arbitration law. I would not reach that question, however, because I conclude that the parties have made no such agreement.

not sit to review." *Ante*, at 474. I have no quarrel with the general proposition that the interpretation of contracts is a matter of state law. By ending its analysis at that level of generality, however, the Court overlooks well-established precedent to the effect that, in order to guard against arbitrary denials of federal claims, a state court's construction of a contract in such a way as to preclude enforcement of a federal right is not immune from review in this Court as to its "adequacy."

Many of our cases that so hold involve, understandably enough, claims under the Contract Clause. In *Appleby* v. *City of New York*, 271 U. S. 364 (1926), for example, petitioners alleged that the city had unconstitutionally impaired their rights contained in a contract deeding them certain submerged lands in the city harbor. Chief Justice Taft stated the issue for the Court as follows:

> "The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and, third, was its obligation impaired by subsequent legislation as enforced by the state court? These questions we must answer independently of the conclusion of [the state] court. Of course we should give all proper weight to its judgment, but we can not perform our duty to enforce the guaranty of the Federal Constitution as to the inviolability of contracts by state legislative action unless we give the questions independent consideration." *Id.*, at 379–380.

Similarly, in *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95 (1938), the question was whether the State's repeal of a teacher tenure law had impaired petitioner's contract of employment. We reversed the judgment of the State Supreme Court, notwithstanding that it rested on the state ground that petitioner had had no contractual right to continued employment: "On such a question, one primarily of state law, we accord respectful consideration and great weight to the views of the State's highest court but, in order that the constitu-

tional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation." *Id.*, at 100. See also *Phelps* v. *Board of Education of West New York*, 300 U. S. 319, 322–323 (1937); *Irving Trust Co.* v. *Day*, 314 U. S. 556, 561 (1942).

The issue has not arisen solely in cases brought under the Contract Clause. *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649 (1942), was a Commerce Clause case where appellant's constitutional challenge to a state tax was dependent on a particular interpretation of a contract under which appellant operated. While we sustained the Tennessee court's construction of that contract (and thus did not reach the federal issue), we emphasized that the "meaning and effect of the contract" were "local questions conclusively settled by the decision of the state court save only as this Court, in the performance of its duty to safeguard an asserted constitutional right, may inquire whether the decision of the state question rests upon a fair or substantial basis." *Id.*, at 654.

Indeed, our ability to review state-law decisions in such circumstances is not limited to the interpretation of contracts. In *Rogers* v. *Alabama*, 192 U. S. 226 (1904), we noted the

> "necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. It is well known that this court will decide for itself whether a contract was made as well as whether the obligation of the contract has been impaired. But that is merely an illustration of a more general rule." *Id.*, at 230 (citation omitted).

We accordingly reversed the state court's dismissal, on grounds of "prolixity," of petitioner's motion to quash an

indictment returned against him by a grand jury from which all blacks had been excluded.[5]

While in this case the federal right at issue is a statutory, not a constitutional, one, the principle under which we review the antecedent question of state law is the same. Where "the existence or the application of a federal right turns on a logically antecedent finding on a matter of state law, it is essential to the Court's performance of its function that it exercise an ancillary jurisdiction to consider the state question. Federal rights could otherwise be nullified by the manipulation of state law." Wechsler, The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review, 34 Wash. & Lee L. Rev. 1043, 1052 (1977). See also Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943 (1965).

No less than in the cited cases, the right of the instant parties to have their arbitration agreement enforced pursuant to the FAA could readily be circumvented by a state-court construction of their contract as having intended to exclude the applicability of federal law. It is therefore essential that, while according due deference to the decision of the state court, we independently determine whether we "clearly would have judged the issue differently if [we] were the state's highest court." Wechsler, *supra*, at 1052.[6]

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[5] As in *Rogers*, we have frequently declined to be bound by state procedural rulings that would have prevented us from reaching the federal issue. See, *e. g.*, *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923); *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294, 295–297 (1949); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 454–458 (1958); *James* v. *Kentucky*, 466 U. S. 341, 348–349 (1984). While in recent years we may have been more willing to examine state procedural rulings, see *e. g.*, *Henry* v. *Mississippi*, 379 U. S. 443 (1965), one study of our cases has concluded that we have historically shown less deference to state *substantive* decisions on ancillary questions than to similar procedural decisions. Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 991 (1965); cf. *Davis*, *supra*, at 25.

[6] While the principle of independent review by this Court of the adequacy of the state court's ruling is clear, the proper standard for such

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Arbitration is, of course, "a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 582 (1960). I agree with the Court that "the FAA does not require parties to arbitrate when they have not agreed to do so." *Ante*, at 478. Since the FAA merely requires enforcement of what the parties have agreed to, moreover, they are free if they wish to write an agreement to arbitrate outside the coverage of the FAA. Such an agreement would permit a state rule, otherwise preempted by the FAA, to govern their arbitration. The substantive question in this case is whether or not they have done so. And that question, we have made clear in the past, is a matter of federal law.

Not only does the FAA require the enforcement of arbitration agreements, but we have held that it also establishes substantive federal law that must be consulted in determining whether (or to what extent) a given contract provides for arbitration. We have stated this most clearly in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 24–25 (1983):

> "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements,

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review poses a more difficult question. Indeed, our cases have employed a wide range of standards, ranging from *de novo* review, *e. g.*, *Appleby* v. *City of New York*, 271 U. S. 364, 380 (1926) ("[W]e must give our own judgment . . . and not accept the present conclusion of the state court without inquiry"), to inquiring whether the state judgment rested on a "fair or substantial basis," *Memphis Gas Co.* v. *Beeler*, 315 U. S. 649, 654 (1942); *Demorest* v. *City Bank Co.*, 321 U. S. 36, 42 (1944), to determining whether the state court's decision was "palpably erroneous," *Phelps* v. *Board of Education of West New York*, 300 U. S. 319, 323 (1937). I have no doubt that the proper standard of review is a narrow one, but I see no need for purposes of the present case to settle on a precise formulation. As will appear below, the state court's construction of the choice-of-law clause cannot be sustained regardless of the standard employed.

> notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act. . . . [T]he Courts of Appeals have . . . consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. We agree. The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."

More recently, in *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U. S. 614 (1985), we stated that a court should determine whether the parties agreed to arbitrate a dispute "by applying the 'federal substantive law of arbitrability.'" *Id.*, at 626, quoting *Moses H. Cone, supra*, at 24. See also *Southland Corp.* v. *Keating*, 465 U. S. 1 (1984).

The Court recognizes the relevance of the *Moses H. Cone* principle but finds it unoffended by the Court of Appeal's decision, which, the Court suggests, merely determines what set of procedural rules will apply. *Ante*, at 476.[7] I agree fully with the Court that "the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate," *ibid.*, but I disagree emphatically

[7] Some of the Court's language might be read to suggest that the *Moses H. Cone* principle applies only to construction of the arbitration clause itself. *Ante*, at 476 ("[A]mbiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration"). Such a reading is flatly contradicted by *Moses H. Cone*. In language the Court omits from its quotation, *ante*, at 475, we made clear that the liberal rule of construction in favor of arbitrability applies "whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital*, 460 U. S., at 25.

with its conclusion that that policy is not frustrated here. Applying the California procedural rule, which stays arbitration while litigation of the same issue goes forward, means simply that the parties' dispute will be litigated rather than arbitrated. Thus, interpreting the parties' agreement to say that the California procedural rules apply rather than the FAA, where the parties arguably had no such intent, implicates the *Moses H. Cone* principle no less than would an interpretation of the parties' contract that erroneously denied the existence of an agreement to arbitrate.[8]

While appearing to recognize that the state court's interpretation of the contract does raise a question of federal law, the Court nonetheless refuses to determine whether the state court misconstrued that agreement. There is no warrant for failing to do so. The FAA requires that a court determining a question of arbitrability not stop with the application of state-law rules for construing the parties' intentions, but that it also take account of the command of federal law that "those intentions [be] generously construed as to issues of arbitrability." *Mitsubishi Motors*, *supra*, at 626. Thus, the decision below is based on both state and federal law, which are thoroughly intertwined. In such circumstances the state-court judgment cannot be said to rest on an "adequate and independent state ground" so as to bar review by this Court. See *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164 (1917) ("But where the non-federal

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[8] Whether or not "the California arbitration rules . . . generally foster the federal policy favoring arbitration," *ante*, at 476, n. 5, is not the relevant question. Section 2 of the FAA requires courts to enforce agreements to arbitrate, and in *Moses H. Cone* we held that doubts as to whether the parties had so agreed were to be resolved in favor of arbitration. Whether California's arbitration rules are more likely than federal law to foster arbitration, *i. e.*, to induce parties to agree to arbitrate disputes, is another matter entirely. On that question it is up to Congress, not this Court, to "fashio[n] a legislative response," *ante*, at 476, n. 5, and in the meantime we are not free to substitute our notions of good policy for federal law as currently written.

ground is so interwoven with the other as not to be an independent matter . . . our jurisdiction is plain"). With a proper application of federal law in this case, the state court's judgment might have been different, and our review is therefore not barred. Cf. *Ake* v. *Oklahoma*, 470 U. S. 68, 74–75 (1985) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded").

II

Construed with deference to the opinion of the California Court of Appeal, yet "with a healthy regard for the federal policy favoring arbitration," *Moses H. Cone*, 460 U. S., at 24, it is clear that the choice-of-law clause cannot bear the interpretation the California court assigned to it.

Construction of a contractual provision is, of course, a matter of discerning the parties' intent. It is important to recall, in the first place, that in this case there is no extrinsic evidence of their intent. We must therefore rely on the contract itself. But the provision of the contract at issue here was not one that these parties drafted themselves. Rather, they incorporated portions of a standard form contract commonly used in the construction industry. That makes it most unlikely that their intent was in any way at variance with the purposes for which choice-of-law clauses are commonly written and the manner in which they are generally interpreted.

It seems to me beyond dispute that the normal purpose of such choice-of-law clauses is to determine that the law of one State rather than that of another State will be applicable; they simply do not speak to any interaction between state and federal law. A cursory glance at standard conflicts texts confirms this observation: they contain no reference at all to the relation between federal and state law in their discussions of contractual choice-of-law clauses. See, *e. g.*,

R. Weintraub, Commentary on the Conflict of Laws § 7.3C (2d ed. 1980); E. Scoles & P. Hay, Conflict of Laws 632–652 (1982); R. Leflar, L. McDougal, & R. Felix, American Conflicts Law § 147 (4th ed. 1986). The same is true of standard codifications. See Uniform Commercial Code § 1–105(1) (1978); Restatement (Second) of Conflict of Laws § 187 (1971). Indeed the Restatement of Conflicts notes expressly that it does not deal with "the ever-present problem of determining the respective spheres of authority of the law and courts of the nation and of the member States." *Id.*, § 2, Comment *c*. Decisions of this Court fully bear out the impression that choice-of-law clauses do not speak to any state-federal issue. On at least two occasions we have been called upon to determine the applicability *vel non* of the FAA to contracts containing choice-of-law clauses similar to that at issue here. Despite adverting to the choice-of-law clauses in other contexts in our opinions, we ascribed no significance whatever to them in connection with the applicability of the FAA. *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506 (1974); *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956).[9] The great weight of lower court authority similarly rejects the notion that a choice-of-law clause renders the FAA inapplicable.[10]

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[9] In *Scherk*, the contract contained the following clause: "The laws of the State of Illinois, U. S. A. shall apply to and govern this agreement, its interpretation and performance." 417 U. S., at 509, n. 1. Despite discussing the effect of that clause in a different context, *id.*, at 519, n. 13, we did not consider the possibility that the FAA might not apply because of the parties' choice of the law of Illinois. Similarly, in *Bernhardt* the contract provided for arbitration under New York law. While we recognized a choice-of-law problem as to whether New York or Vermont law was applicable, 350 U. S., at 205, we resolved the question of arbitrability under the FAA without any reference to the choice-of-law clause.

[10] See, *e. g.*, *Huber, Hunt & Nichols, Inc.* v. *Architectural Stone Co.*, 625 F. 2d 22, 25–26, n. 8 (CA5 1980); *Commonwealth Edison Co.* v. *Gulf Oil Corp.*, 541 F. 2d 1263, 1268–1271 (CA7 1976); *Burke County Public Schools Board of Education* v. *The Shaver Partnership*, 303 N. C. 408, 420–424, 279 S. E. 2d 816, 823–825 (1981); *Episcopal Housing Corp.* v. *Federal Ins. Co.*, 269 S. C. 631, 637, n. 1, 239 S. E. 2d 647, 650, n. 1

Choice-of-law clauses simply have never been used for the purpose of dealing with the relationship between state and federal law. There is no basis whatever for believing that the parties in this case intended their choice-of-law clause to do so.

Moreover, the literal language of the contract—"the law of the place"—gives no indication of any intention to apply only state law and exclude other law that would normally be applicable to something taking place at that location. By settled principles of federal supremacy, the law of any place in the United States includes federal law. See *Claflin* v. *Houseman*, 93 U. S. 130, 136 (1876); *Hauenstein* v. *Lynham*, 100 U. S. 483, 490 (1880) ("[T]he Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution"). As the dissenting judge below noted, "under California law, federal law governs matters cognizable in California courts upon which the United States has definitively spoken." App. 82 (opinion

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(1977); *Tennessee River Pulp & Paper Co.* v. *Eichleay Corp.*, 637 S. W. 2d 853, 857–858 (Tenn. 1982); *Mamlin* v. *Susan Thomas, Inc.*, 490 S. W. 2d 634, 636–637 (Tex. Civ. App. 1973); see also *Liddington* v. *The Energy Group, Inc.*, 192 Cal. App. 3d 1520, 238 Cal. Rptr. 202 (1987) (reversing trial court ruling that had applied § 1281.2(c) rather than the FAA because choice-of-law clause specified contract would be construed under California law). But see *Garden Grove Community Church* v. *Pittsburgh-Des Moines Steel Co.*, 140 Cal. App. 3d 251, 262, 191 Cal. Rptr. 15, 20 (1983); *Standard Co. of New Orleans, Inc.* v. *Elliott Construction Co.*, 363 So. 2d 671, 677 (La. 1978).

Stanford contends that because the *Garden Grove* decision antedated the conclusion of the present contract, it must have informed the language the parties used. Brief for Appellee 31–32; Tr. of Oral Arg. 35. This argument might have greater force if the clause had been one the parties actually negotiated, rather than one they incorporated from an industry-wide form contract. In any case it is impossible to believe that, had they actually intended that a result so foreign to the normal purpose of choice-of-law clauses flow from their agreement, they would have failed to say so explicitly.

of Capaccioli, J.). Thus, "the mere choice of California law is not a selection of California law over federal law . . . ." *Id.*, at 84. In the absence of any evidence to the contrary it must be assumed that this is what the parties meant by "the law of the place where the Project is located."

Indeed, this is precisely what we said when we once previously confronted virtually the same question. In *Fidelity Federal Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141 (1982), a contract provision stated: "This Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located." *Id.*, at 148, n. 5. Rejecting the contention that the parties thereby had agreed to be bound solely by local law, we held: "Paragraph 15 provides that the deed is to be governed by the 'law of the jurisdiction' in which the property is located; but the 'law of the jurisdiction' includes federal as well as state law." *Id.*, at 157, n. 12. We should similarly conclude here that the choice-of-law clause was not intended to make federal law inapplicable to this contract.

III

Most commercial contracts written in this country contain choice-of-law clauses, similar to the one in the Stanford-Volt contract, specifying which State's law is to govern the interpretation of the contract. See Scoles & Hay, Conflict of Laws, at 632–633 ("Party autonomy means that the parties are free to select the law governing their contract, subject to certain limitations. They will usually do so by means of an express choice-of-law clause in their written contract"). Were every state court to construe such clauses as an expression of the parties' intent to exclude the application of federal law, as has the California Court of Appeal in this case, the result would be to render the Federal Arbitration Act a virtual nullity as to presently existing contracts. I cannot believe that the parties to contracts intend such consequences to flow from their insertion of a standard choice-of-law

clause. Even less can I agree that we are powerless to review decisions of state courts that effectively nullify a vital piece of federal legislation. I respectfully dissent.

Syllabus

NORTHWEST CENTRAL PIPELINE CORP. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL.

APPEAL FROM THE SUPREME COURT OF KANSAS

No. 86–1856. Argued November 29, 1988—Decided March 6, 1989

The issues for decision are whether a regulation adopted by appellee State Corporation Commission of Kansas (KCC) (1) was pre-empted by the federal Natural Gas Act (NGA) or (2) violates the Commerce Clause of the Constitution. Interrelated market, contractual, and regulatory factors have led interstate pipelines to cut back their purchases of "old," federally regulated natural gas from producers at the Kansas-Hugoton field. The KCC found that the cutbacks had caused an imbalance between underproduced Hugoton wells supplying interstate pipelines and overproduced wells supplying the intrastate market, resulting in drainage between wells that posed a threat to producers' correlative property rights in the field's common gas pool. To protect correlative rights, the KCC adopted a regulation providing that producers' entitlements to assigned quantities of Hugoton gas would permanently be canceled if production were too long delayed. The KCC reasoned that, were permanent cancellation of production underages the alternative to their timely production, purchasers and producers would have an incentive to run more gas out of the field and thereby reduce existing underages, deter future underages, and restore balance to the field. In dismissing a challenge to the regulation by appellant, an interstate pipeline having a long-term contract for Hugoton gas, the KCC rejected the contention that the regulation was pre-empted by the NGA, which gives the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over the transportation and sale for resale of regulated gas in interstate commerce, including interstate pipelines' purchasing policies and pricing practices. On judicial review, a county court agreed that the regulation was not pre-empted, and the Kansas Supreme Court affirmed.

Held:

1. Congress has not exercised its power under the Supremacy Clause of Art. VI of the Constitution to pre-empt the KCC regulation, and therefore the judgment of the Kansas Supreme Court holding that the Commission's regulation was not pre-empted is affirmed. Pp. 509–522.

(a) The regulation does not encroach upon a field that Congress has marked out for comprehensive and exclusive federal control, but, in fact, regulates in a field that Congress expressly left to the States. Section 1(b) of the NGA carefully divides up regulatory power over the natural

gas industry, conferring on FERC exclusive jurisdiction over interstate transportation and sales, but expressly reserving to the States the power to regulate, *inter alia*, "production or gathering." Since the latter phrase and the NGA's legislative history clearly establish Congress' intent not to interfere with the States' traditional power to regulate production—and therefore rates of production over time—as a means of conserving natural resources and protecting producers' correlative rights, the KCC's regulation represents precisely the sort of scheme that Congress intended to leave within a State's authority. To find field preemption merely because the regulation might affect gas purchasers' costs and hence interstate rates would be largely to nullify such state authority, for there can be little if any regulation of production that might not have at least an incremental effect on purchasers' costs in some market and contractual situations. *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas*, 372 U. S. 84, and *Transcontinental Pipe Line Corp.* v. *State Oil and Gas Bd. of Mississippi*, 474 U. S. 409, which invalidated state regulations directed to interstate purchasers, distinguished. Pp. 510–514.

(b) The regulation does not conflict with the federal scheme regulating interstate purchasers' cost structures. Appellant has not asserted that there exists any conflict so direct that it is impossible for pipelines to comply with both the regulation and with federal regulation of purchasing practices and pricing. Moreover, Kansas' threat to cancel underages does not prevent the attainment of FERC's regulatory goals, because the regulation imposes no direct purchasing requirements on pipelines, but simply defines producers' rights to extract gas; because FERC will make its own regulatory decisions with the KCC's regulation in mind; and because, if the regulation operates as a spur to greater production of low-cost Hugoton gas as Kansas intends, this would be congruous with current federal goals. Further, the purpose of the regulation is to protect the correlative rights of producers, and the means adopted are plausibly related to that legitimate state goal. The KCC's asserted purpose is not rendered suspect by the fact that the regulation might worsen correlative rights problems if underages are actually canceled, since the KCC's assumption that the regulation would likely increase production is not implausible in light of supporting evidence in the record. Pp. 514–519.

(c) The regulation is not pre-empted under §§ 7(c) and 7(b) of the NGA, which respectively require that producers who sell gas to pipelines for resale in interstate commerce obtain a certificate of public convenience and necessity from FERC and obligate certificated producers to continue supplying "old" gas in the interstate market until FERC authorizes an abandonment. Plainly meritless is appellant's argument

that, since a producer's available reserves are a factor in FERC's certification decision, and since cancellation of underages under the regulation will work an abandonment through the noncompensable drainage of dedicated reserves, such an abandonment without FERC's approval undercuts the certification and abandonment process. FERC's abandonment authority encompasses only gas that operators have a right under state law to produce, and the regulation has settled that right in Kansas. Nor is there merit to appellant's argument to the effect that the regulation stands as an obstacle to the objective Congress sought to attain when it gave FERC authority over certification and abandonment—assuring the public a reliable source of gas. That goal is entirely harmonious with the regulation's aim of assuring that producers have an opportunity to extract all the reserves underlying their leases before the Hugoton field is exhausted. Pp. 520–522.

2. The KCC regulation does not violate the Commerce Clause of Art. I, § 8, of the Constitution. Pp. 522–526.

(a) The regulation does not amount to *per se* unconstitutional economic protectionism, since it is neutral on its face, providing for the cancellation of producers' underages regardless of whether they supply the intrastate or interstate markets, and since its effects on interstate commerce are incident to Kansas' legitimate efforts under § 1(b) of the NGA to regulate production to prevent waste and protect correlative rights. Moreover, current federal policy is to encourage the production of low-cost gas, so that were the regulation to increase takes from Kansas at the expense of States producing more costly gas, this would not disrupt interstate commerce but would improve its efficiency. Although Kansas may fail in its efforts to encourage production of underages, and the regulation might as a result engender noncompensable drainage to producers for the intrastate market, such indirect and speculative effects on interstate commerce are insufficient to render the regulation unconstitutional. Pp. 522–525.

(b) The regulation is not invalid under the balancing test set forth in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142, since it applies evenhandedly, regardless of whether the producer supplies the intrastate or interstate market, and is an exercise of Kansas' traditional and congressionally recognized power over gas production. Moreover, the regulation's intended effect of increasing production is not clearly excessive in relation to Kansas' substantial interest in controlling production to prevent waste and protect correlative rights; and the possibility that it may result in the diversion of gas to intrastate purchasers is too impalpable to override the State's weighty interest. Appellant's claim that the regulation must be invalidated because Kansas could have achieved its aims without burdening interstate commerce simply by establishing produc-

tion quotas in line with appellant's conception of market demand levels is rejected, since appellant has not challenged the KCC's determination of allowables and has identified nothing in the record that could adequately establish that the KCC might have achieved its goals as effectively had it adopted a different allowables formula. Pp. 525–526.

240 Kan. 638, 732 P. 2d 775, affirmed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Harold L. Talisman argued the cause for appellant. With him on the briefs were *Bobby Potts*, *Lewis A. Posekany, Jr.*, *John H. Cary*, *Jeffrey D. Komarow*, *Michael E. Small*, and *Mark H. Adams II*.

Frank A. Caro, Jr., argued the cause for appellee. With him on the brief was *Shari M. Feist*.

Michael R. Lazerwitz argued the cause for the United States and the Federal Energy Regulatory Commission as *amici curiae* urging affirmance. With him on the brief were *Solicitor General Fried*, *Deputy Solicitor General Merrill*, *Harriet S. Shapiro*, *Catherine C. Cook*, *Jerome M. Feit*, *John H. Conway*, and *Timm L. Abendroth*.*

JUSTICE BRENNAN delivered the opinion of the Court.

In this appeal, we must decide whether a regulation adopted by the State Corporation Commission of Kansas (KCC) to govern the timing of production of natural gas from the Kansas-Hugoton field violates either the Supremacy or the Commerce Clause of the Constitution. We hold that it does not.

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*Briefs of *amici curiae* urging affirmance were filed for the Council of State Governments et al. by *Benna Ruth Solomon*, *Beate Bloch*, and *Robert F. Shapiro;* for the Interstate Oil Compact Commission by *Richard C. Byrd* and *W. Timothy Dowd;* and for the Railroad Commission of Texas et al. by *Hal Stratton*, Attorney General of New Mexico, *Robert G. Stovall*, Assistant Attorney General, *Nicholas J. Spaeth*, Attorney General of North Dakota, *Lindil C. Fowler, Jr.*, *G. Gail Watkins*, and *David B. Robinson*.

I

At issue is a KCC regulation providing for the permanent cancellation of producers' entitlements to quantities of Kansas-Hugoton gas. Designed as a counterweight to market, contractual, and regulatory forces that have led interstate pipelines to cut back purchases from Kansas-Hugoton producers, the KCC's regulation seeks to encourage timely production of gas quotas by providing that the right to extract assigned amounts of gas will permanently be lost if production is too long delayed. Appellant Northwest Central Pipeline Corporation, an interstate pipeline, argues that the KCC's regulation is pre-empted by federal regulation of the interstate natural gas business because it exerts pressure on pipelines to increase purchases from Hugoton producers and so affects their purchase mixes and cost structures, and because it impinges on exclusive federal control over the abandonment of gas reserves dedicated to interstate commerce. Northwest Central also urges that the regulation violates the Commerce Clause because it coerces pipelines to give Kansas producers a larger share of the interstate gas market at the expense of producers in other States, or, alternatively, causes the diversion of gas from the interstate to the intrastate market.

A

Kansas' regulation of the Hugoton field is an effort to solve perplexing problems in assigning and protecting property rights in a common pool of gas and in preventing waste of limited natural resources. Gas migrates from high-pressure areas of a pool around shut-in (or slow-producing) wells to low-pressure areas around producing (or faster producing) wells. As a consequence of this phenomenon a single producing well might exhaust an entire gas pool, though rights in the pool belong to many different owners. Absent countervailing regulation or agreement among all owners, the fact that gas migrates to low-pressure, heavily produced areas creates an incentive for an owner to extract gas as fast as

possible, in order both to prevent other owners draining gas it might otherwise produce, and to encourage migration to its own wells that will enable it to capture a disproportionate share of the pool. A rush to produce, however, may cause waste. For example, gas may be produced in excess of demand; more wells may be drilled than are necessary for the efficient production of the pool; or the field may be depleted in such a way that it is impossible to recover all potentially available mineral resources (in particular oil, which is recovered using reservoir energy often supplied by associated natural gas reserves). See generally McDonald, Prorationing of Natural Gas Production: An Economic Analysis, 57 U. Colo. L. Rev. 153 (1985–1986).

The common-law rule of capture, whereby gas was owned by whoever produced it from the common pool, left unchecked these twin problems of perceived inequities between owners of rights in the pool and of waste resulting from strong economic disincentives to conserve resources. *Ibid.* In response, producing States like Kansas have abandoned the rule of capture in favor of assigning more equitable correlative rights among gas producers and of directly regulating production so as to prevent waste. Kansas by statute prohibits waste, Kan. Stat. Ann. § 55–701 (1983); directs the KCC to "regulate the taking of natural gas from any and all common sources of supply within this state in order to prevent the inequitable or unfair taking of natural gas from a common source of supply," Kan. Stat. Ann. § 55–703(a) (Supp. 1987); and gives content to the concept of equitable taking of natural gas by obliging the KCC to regulate so that producers

> "may produce only that portion of all the natural gas that may be currently produced without waste and to satisfy the market demands, as will permit each developed lease to ultimately produce approximately the amount of gas underlying the developed lease and currently produce proportionately with other developed leases in the com-

mon source of supply without uncompensated cognizable drainage between separately-owned, developed leases or parts thereof." *Ibid.*

Pursuant to statutory authority, the KCC in 1944 adopted the Basic Proration Order for the Hugoton field, after finding that uncompensated drainage caused by disproportionate production had impaired the correlative rights of owners of developed Hugoton leases. See Basic Proration Order ¶¶(d)–(f), App. 9–11. The object of the order was to fix a formula for determining well production quotas or "allowables" at such a level that, without waste, "each developed lease will be enabled to currently produce its . . . allowable so that ultimately such developed lease will have an opportunity to produce approximately the amount of gas which underlies such lease." App. 7; see also Basic Proration Order ¶(j), App. 17. To this end, the KCC was to set a monthly gas production ceiling for the Kansas-Hugoton field based on estimates of market demand,[1] and to assign a portion of this production to individual wells as an allowable in an amount keyed to the acreage served by the well and to the well's "deliverability," or ability to put gas into a pipeline against pipeline pressure (a factor that increases with wellhead pressure). *Id.*, ¶¶(g)–(l), App. 11–22.

The Hugoton Basic Proration Order also allows for tolerances in the production of a well's allowable to account for underproduction or overproduction, which may be caused by variations in demand for a producer's gas. If a well produces less than its allowable it accrues an "underage." If it

[1] The KCC determines market demand levels twice a year based upon an analysis of "reasonable, current requirements for consumption and use within and without the state over a six-month period, the open flow production, a series of nominations by producers, and requirement requests by purchasers." Lungren, Natural Gas Prorationing in Kansas, 57 U. Colo. L. Rev. 251, 257–258 (1985–1986) (footnotes omitted). The KCC thus does not regard itself as bound to treat pipelines' expected takes as the measure of market demand for the purpose of assigning allowables.

produces more than its allowable it accrues an "overage." Kansas' achievement of its goal that each well should have the opportunity eventually to produce approximately the gas underlying the developed lease depends upon drainage occurring over time to compensate for any accrued underage or overage.[2] At issue in this case is the constitutionality of the regulation the KCC adopted in 1983 to encourage production of, and hence compensating drainage for, vast underages that it found had accrued as a result of pipelines' decisions to use the Hugoton field for storage while taking gas for current needs from elsewhere.

Prior to the 1983 amendment, the Basic Proration Order for the Hugoton field provided that underages were canceled after they reached six or nine times the monthly allowable, depending upon the adjusted deliverability of the well, but that canceled underages could readily be reinstated so as in effect to be available for use at any time. *Id.*, ¶(p), App. 23–24.[3] Under this regulatory scheme, however, the Hugo-

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[2] As the Kansas Supreme Court explained the process of compensatory drainage in this case:

"When a well is underproduced in relation to its allowable, and relative to the other wells which are producing their allowables, its pressure becomes higher. If this condition is permitted to continue over a period of time, drainage occurs from the underproduced well with the higher pressure to the low pressure area of the overproduced wells. As pressure is a major component in determining adjusted deliverability, the pressure differences result in a higher adjusted deliverability for the underproduced wells with a resulting increase in the current allowable. When the larger allowable and underage is produced, the well's pressure drops below the other wells and compensating drainage occurs. After the pressure drop the adjusted deliverability for the well is decreased with a resulting decrease in its allowable. This is the technique utilized in the attempt to keep the wells in balance in the long pull." *Northwest Central Pipeline Corp.* v. *Kansas Corp. Comm'n*, 237 Kan. 248, 251, 699 P. 2d 1002, 1007 (1985), vacated and remanded, 475 U. S. 1002 (1986), on remand, 240 Kan. 638, 732 P. 2d 775 (1987).

[3] Prior to amendment, paragraph (p) provided that canceled underages

ton field had become greatly underproduced, with noncanceled underages totaling 204 billion cubic feet and canceled and unreinstated underages totaling 314 billion cubic feet as of September 1, 1982. App. to Juris. Statement 74a, 76a. It also appeared that the field was seriously imbalanced, because some producers had accrued substantial overages during the same period. App. 128–130.

This underproduction and imbalance resulted from a combination of interrelated market, contractual, and regulatory factors. Kansas-Hugoton gas is substantially dedicated by long-term contract to five interstate pipelines, including appellant Northwest Central. These pipelines purchase gas from Kansas producers for transportation and resale outside the State. A sixth major purchaser of Kansas-Hugoton gas is the Kansas Power and Light Company, which buys gas for the intrastate market.

The interstate pipelines generally entered into their current contracts to purchase Kansas-Hugoton gas at a time when the market was little developed and oligopsonic. These contracts usually provide for relatively low prices and do not contain "take-or-pay" provisions requiring the purchaser to pay for some minimum quantity of gas irrespective of whether it takes current delivery.[4] Since these contracts were made, however, the gas market has gone through consider-

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"'will be reinstated upon verified application therefore, showing that the wells are in an overproduced status; that the purchaser is willing and able to take the amounts of gas; and that the length of time proposed by applicant for the production of the amounts of gas to be reinstated is reasonable under the circumstances.'" App. 24.

[4] Take-or-pay provisions

"essentially requir[e] [pipelines] either to accept currently a certain percentage of the gas each well [is] capable of producing, or to pay the contract price for that gas with a right to take delivery at some later time, usually limited in duration. Take-or-pay provisions enable sellers to avoid fluctuations in cash flow and are therefore thought to encourage investment in well development." *Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Bd. of Mississippi*, 474 U. S. 409, 412 (1986) *(Transco)*.

able changes. See Pierce, State Regulation of Natural Gas in a Federally Deregulated Market: The Tragedy of the Commons Revisited, 73 Cornell L. Rev. 15, 18–20 (1987). Following a period of federal maintenance of low wellhead price ceilings under the Natural Gas Act (NGA), 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.*, an acute shortage of natural gas during the 1970's prompted Congress to enact the Natural Gas Policy Act of 1978 (NGPA), 92 Stat. 3352, 15 U. S. C. § 3301 *et seq.* To encourage production, the NGPA took wellhead sales of "new" and "high-cost" gas outside the coverage of the NGA, § 601(a)(1)(B), 15 U. S. C. § 3431(a)(1)(B), and provided instead for market-driven wellhead pricing, at first up to a high ceiling, and later with no ceiling. See § 102(b), 15 U. S. C. § 3312(b) (new gas ceilings); § 103(b), 15 U. S. C. § 3313(b) (high-cost gas ceilings); § 121, 15 U. S. C. § 3331 (elimination of price controls). Many pipelines responded to the availability of new, higher priced deregulated gas by committing themselves to long-term contracts at high prices that required them to take-or-pay for a large part of a producer's contractually dedicated gas reserves. When the market dwindled in the early 1980's, interstate pipelines reduced their takes under contracts with Kansas-Hugoton producers for "old," low-priced gas, in large part because these contracts included no take-or-pay penalty. As a result, production from parts of the field fell. In effect, interstate purchasers began to use the Hugoton field for storage while they took gas for their immediate needs from elsewhere—a practice facilitated by paragraph (p) of the Hugoton Basic Proration Order, which permitted stored gas to be produced more or less at any time.

At the same time, however, Kansas-Hugoton producers dependent upon other purchasers in different contractual and market situations suffered no cutback in takes and indeed accumulated substantial overages. See Pierce, 73 Cornell L. Rev., at 47. For example, wells produced by Mesa Petroleum Company delivering gas for the intrastate market to the

Kansas Power and Light Company were overproduced by 2.6 billion cubic feet by late 1982. *Northwest Central Pipeline Corp.* v. *Kansas Corp. Comm'n*, 237 Kan. 248, 252, 699 P. 2d 1002, 1008 (1985). See App. 128–130.

The substantial Hugoton underages and field imbalance prompted a KCC investigation. After conducting a hearing, the KCC, on February 16, 1983, issued the order challenged in this case, amending paragraph (p) of the Basic Proration Order to provide for the permanent cancellation of underages in certain circumstances.[5] The KCC determined that the imbalance between overproduced and underproduced Hugoton wells was causing drainage between wells that posed a

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[5] Order of Feb. 16, 1983, App. to Juris. Statement 63a–80a, aff'd on rehearing, Order of Apr. 18, 1983, App. to Juris. Statement 81a–92a. As the Kansas Supreme Court explained:

"The amendments to paragraph (p) in dispute here divide the cancelled underage in the field into three categories: (1) underage cancelled prior to January 1, 1975; (2) underage cancelled between January 1, 1975, and December 31, 1982; and (3) underage cancelled after December 31, 1982. For each of the categories of underage the [KCC] established requirements to be met by producers seeking to have such underage reinstated. For the pre-1975 cancelled underage, a producer was required to make application for reinstatement . . . on or before December 31, 1983. For 1975 to 1982 cancelled underage, reinstatment must be requested by December 31, 1985. For underage cancelled after December 31, 1982, the producer has three years from the date of cancellation to apply for reinstatement. For any producer to request reinstatement of underage cancelled after 1974, the affected well must be in an overproduced status. Any underage not reinstated, or if reinstated not produced at the end of the alloted time period, will be cancelled permanently. A producer has sixty months in which to produce the reinstated underage." 237 Kan., at 253, 699 P. 2d, at 1008–1009.

The KCC has since amended paragraph (p) again, to make it easier for a producer to have underages reinstated and to find a buyer for its gas. The requirements that the well for which application for reinstatement is made be in an overproduced status, and that the applicant identify the purchaser for the gas have been removed to enhance producers' ability to participate in the open "spot" market. See Order of Sept. 16, 1987, App. to Brief for Appellee 7a–16a.

threat to the correlative rights of producers. The KCC further found that, were permanent cancellation of underages the alternative to their timely production, existing underages might be reduced, future underages deterred, and balance restored to the field. App. to Juris. Statement 72a–75a.[6] As Mr. Ron Cook, a member of the KCC's staff, explained in his testimony at the hearing, producers that had accrued substantial underages might never be able to produce them without a rule change, and hence might not be able to benefit from their correlative rights to a proportionate share of the field's reserves:

> "Correlative rights have been and are currently being violated by the uncompensated drainage that is occurring due to the unratable taking of allowables between offsetting leases. Future projection of gas production from the Hugoton Field indicate[s] that this trend of accumulating more underage and cancelled underage will continue for a number of years.
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> "There is a definite possibility that near the end of many of the wells[']' productive li[ves], there will be a tremendous amount of cancelled underage that will never be reinstated due to the physical inability of the wells to make up such underage. This will result in a greater violation of correlative rights, because under the present provisions of Paragraph P of the basic order, there is no incentive to reinstate cancelled underage in a timely manner in order to prevent the large volumes of underage which will be cancelled permanently at the time the well is abandoned.

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[6] The KCC also stated that the quantity of underages had simply made it too difficult to administer the field to achieve statutorily defined goals: "In the future, it will be practically impossible to ascertain the balance of the field if underages relate backward in perpetuity. Some sort of benchmark is necessary if the Commission is to effectively balance takes from the field." App. to Juris. Statement 76a.

> "Therefore, it is the intent of the staff's propos[ed amendment to paragraph (p)] to provide an incentive for the producer and purchaser to run more gas in order to prevent more underage being cancelled and to establish . . . a timely manner in which to begin reinstating and making up previously cancelled underage." App. 35–36; see also Pierce, 73 Cornell L. Rev., at 47.

Thus, the purpose of the new regulation was to "instill the incentive for the purchasers and the producers to run more gas out of the field," App. 44, in order that Kansas producers with underages might produce their current allowables and accumulated underage and obtain compensating drainage, *id.*, at 49, prior to the field's exhaustion, see *id.*, at 48.[7]

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[7] The KCC plainly stated that its intent in adopting the 1983 amendment to paragraph (p) was to protect producers' correlative rights. But its attempt to explain the precise relationship between its order and such rights—as opposed to the explanation offered by its staff member Mr. Cook, quoted in the text—foundered upon a misconstruction of the Kansas law defining correlative rights. The KCC apparently believed the amendment would protect the correlative rights of producers who *were* producing their current allowables "to participate in a given market for a given period of time." *Id.*, at 73a. Because adjusted deliverability varies with well pressure, see *supra*, at 500, and n. 2, a heavily producing operator's share of the field allowable falls as its well pressure falls in relation to that of shut-in wells. App. to Juris. Statement 73a and 75a; see also App. 128–129. If all wells produce their allowables, however, pressure will decrease uniformly over the field and these fluctuations in producers' shares of field allowables—and hence in their ability to participate in the market at a particular time—will not occur. The KCC's view that this was desirable depended upon an assumption that correlative rights inhere in *current* production, rather than in production over the life of the field. The Kansas Supreme Court expressly disapproved that construction of state law in this case. 237 Kan., at 256–257, 699 P. 2d, at 1010–1011. The court held, though, that the KCC's error did not undermine its order because the order did not in fact conform to the KCC's new definition of correlative rights in current production (and indeed the court believed that no workable order could do so, since it was not possible for the KCC to "force current equal production from all wells in the common source of supply," *id.*, at 257, 699 P. 2d, at 1011). Instead, the court decided, paragraph (p) con-

B

The natural gas industry is subject to interlocking regulation by both federal and state authorities. The NGA continues to govern federal regulation of "old" gas—gas already dedicated to interstate commerce when the NGPA was enacted and not otherwise excluded from federal regulation—including most Kansas-Hugoton gas. NGA § 1(b), 15 U. S. C. § 717(b), provides for exclusive Federal Energy Regulatory Commission (FERC) jurisdiction over "the transportation of natural gas in interstate commerce, . . . the sale in interstate commerce of natural gas for resale . . . , and . . . natural-gas companies engaged in such transportation or sale." This jurisdiction encompasses regulation of market entry through FERC's authority to issue certificates of public convenience and necessity authorizing pipelines to transport and sell gas in interstate commerce, NGA § 7(e), 15 U. S. C. § 717f(e), and of market exit through FERC's control over the abandonment of certificated interstate service. NGA § 7(b), 15 U. S. C. § 717f(b). FERC's powers also extend to enforcing wellhead price ceilings for old gas, now set forth in §§ 104 and 106(a) of the NGPA, 15 U. S. C. §§ 3314 and 3316(a); and to regulating other terms of sales of regulated gas for resale, ensuring that rates, and practices and contracts affecting rates, are just and reasonable. NGA §§ 4 and 5, 15 U. S. C. §§ 717c and 717d; see NGPA § 601(a), 15 U. S. C. § 3431(a). Pursuant to these powers FERC regulates the mix of purchases by natural gas pipelines. See, *e. g.*, *Northwest Central Pipeline Corp.*, 44 FERC ¶ 61,222 (1988), aff'g 33 FERC ¶ 63,067 (1985) (finding various of appellant's purchasing practices to be prudent). A pipeline's purchase mix affects

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formed to the statutory definition of correlative rights as a producer's right eventually to recover the gas underlying its leases, *id.*, at 256–257, 699 P. 2d, at 1011, apparently for the reasons Mr. Cook stated in his testimony, see *id.*, at 261–263, 699 P. 2d, at 1014–1015.

both its costs and the prices for which it sells its gas, see, *e. g.*, *Columbia Gas Transmission Corp.*, 43 FERC ¶ 61,482 (1988) (average cost of gas purchases passed through to pipeline's customers), and so comes within FERC's exclusive authority under the NGA "to regulate the wholesale pricing of natural gas in the flow of interstate commerce from wellhead to delivery to consumers." *Maryland* v. *Louisiana*, 451 U. S. 725, 748 (1981).[8]

Section 1(b) of the NGA, 15 U. S. C. § 717(b), also expressly carves out a regulatory role for the States, however, providing that the States retain jurisdiction over intrastate transportation, local distribution, and distribution facilities, and over "the production or gathering of natural gas."

Relying on *Northern Natural Gas Co.* v. *State Corporation Comm'n of Kansas*, 372 U. S. 84, 90–93 (1963), for the proposition that the federal regulatory scheme pre-empts state regulations that may have either a direct or indirect effect on matters within federal control, Northwest Central challenged the new paragraph (p) of the Basic Proration Order on the grounds that, though directed to producers, it impermissibly affects interstate pipelines' purchasing mix and hence price structures, and requires the abandonment of gas dedicated to interstate commerce, both matters within FERC's jurisdiction under the NGA. On rehearing, the KCC dismissed this challenge, distinguishing *Northern Natural* because the rule at issue there had directly regulated purchasers; the purpose of the amendment to paragraph (p), on the

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[8] Under the NGA, FERC engaged in "'utility-type ratemaking' control over prices and supplies," *Transco*, 474 U. S., at 420. Though the NGPA removed from affirmative federal control the wellhead price of new and high-cost gas, nevertheless it "did not compromise the comprehensive nature of federal regulatory authority over interstate gas transactions," *Schneidewind* v. *ANR Pipeline Co.*, 485 U. S. 293, 300, n. 6 (1988), and this Court held in *Transco* that Congress' intent in the NGPA that the supply, the demand, and the price of deregulated gas be determined by market forces requires that the States still may not regulate purchasers so as to affect their cost structures. 474 U. S., at 422–423.

other hand, "is to prevent waste, protect the correlative rights of mineral interests owners and promote the orderly development of the field, functions clearly reserved to the states under the production exemption of the [NGA]. The February 16th order does not require pipelines purchasers to do anything or refrain from doing anything." App. to Juris. Statement 87a. On petition for judicial review, the District Court of Gray County, Kansas, found that the change in paragraph (p) would provide an incentive to purchasers to take more Kansas-Hugoton gas, and as a result would "cause a change in the 'mix' of natural gas which pipelines transport for sale many miles away." *Id.*, at 58a. But despite the new order's probable consequences for pipeline purchasing practices and price structures, the District Court held that it fell within the production and gathering exemption of NGA § 1(b), 15 U. S. C. § 717(b), because it was directed to gas producers, which were the subject of the threatened cancellation of allowables. *Id.*, at 59a. The Kansas Supreme Court affirmed on the same ground. *Northwest Central Pipeline Corp.* v. *Kansas Corp. Comm'n*, 237 Kan. 248, 699 P. 2d 1002 (1985). It stated that the challenged order "obviously is intended for purchasers." *Id.*, at 266, 699 P. 2d, at 1017. Nevertheless, the court held that because the order directly related to producers' allowables, and because "the matter of allowables must be construed to pertain to production[, t]he rules on underages are a part of production regulation and thus are not violative of the [NGA], even though purchasers are indirectly caught in the backwash." *Id.*, at 267, 699 P. 2d, at 1017.

We vacated the Kansas Supreme Court's judgment, *Northwest Central Pipeline Corp.* v. *Corporation Comm'n of Kansas*, 475 U. S. 1002 (1986), and remanded for further consideration in light of our decision in *Transcontinental Pipe Line Corp.* v. *State Oil and Gas Bd. of Mississippi*, 474 U. S. 409 (1986) *(Transco)*—a case in which we had declared the post-NGPA vitality of *Northern Natural*'s holding that state

regulations requiring purchasers to take gas ratably from producers are pre-empted by the federal regulatory power over pipelines' costs and purchasing patterns. See n. 8, *supra*. On remand, the Kansas Supreme Court reaffirmed its prior decision, distinguishing *Transco*, as it had *Northern Natural*, on the ground that the state regulation in that case governed the actions of purchasers rather than producers. It held that as a regulation of producers, aimed primarily at the production of gas rather than at its marketing, paragraph (p), as amended, was not pre-empted. 240 Kan. 638, 645–646, 732 P. 2d 775, 780 (1987). We noted probable jurisdiction, 486 U. S. 1021 (1988), and now affirm.

II

Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law, *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218 (1947), or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives, *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). See *Schneidewind* v. *ANR Pipeline Co.*, 485 U. S. 293, 299–300 (1988); *Louisiana Public Service Comm'n* v. *FCC*, 476 U. S. 355, 368–369 (1986); *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 203–204 (1983). Paragraph (p) of the Hugoton Basic Proration Order regulates in a field that Congress expressly left to the States; it does not conflict with the federal regulatory scheme; hence it is not pre-empted.

A

We first consider appellant's claim that Kansas' paragraph (p) regulates in a field occupied by Congress, because it intrudes upon FERC's continuing authority under the NGA and NGPA comprehensively to regulate the transportation and prices of "old" gas sold in interstate commerce and to oversee interstate pipelines' purchasing mixes.

When it enacted the NGA, Congress carefully divided up regulatory power over the natural gas industry. It "did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act." *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 502–503 (1949). Indeed, Congress went so far in § 1(b) of the NGA, 15 U. S. C. § 717(b), as to prescribe not only "the intended reach of the [federal] power, but also [to] specif[y] the areas into which this power was not to extend." 337 U. S., at 503. Section 1(b) conferred on federal authorities exclusive jurisdiction "over the sale and transportation of natural gas in interstate commerce for resale," *Northern Natural*, 372 U. S., at 89, at the same time expressly reserving to the States the power to regulate, among other things "the production or gathering of natural gas," that is, "the physical acts of drawing gas from the earth and preparing it for the first stages of distribution." *Id.*, at 90.

It has long been recognized that absent pre-emptive federal legislation or regulation, States may govern the production of natural resources from a common pool, in order to curb waste and protect the correlative rights of owners, by prorating production among the various wells operating in a field. See *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210 (1932); *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1937). The power "to allocate and conserve scarce natural resources" remained with the States after the enactment of the NGA, as a result

of the system of dual state and federal regulation established in § 1(b) of that Act. *Northern Natural*, *supra*, at 93. The terms "production and gathering" in § 1(b) are sufficient in themselves to reserve to the States not merely "control over the drilling and spacing of wells and the like," *Colorado Interstate Gas Co.* v. *FPC*, 324 U. S. 581, 603 (1945), but also the power to regulate rates of production over time—a key element, after all, in efforts to prevent waste and protect correlative rights. In any event, the legislative history of the NGA, explored at length in our decision in *Panhandle Eastern*, *supra*, makes plain Congress' intent not to interfere with the States' power in that regard. The Solicitor of the Federal Power Commission (FPC), the predecessor of FERC, assured Congress that an earlier bill substantially similar to the NGA did "not attempt to regulate the gathering rates" of gas producers, that being a matter of purely local concern. Hearings on H. R. 11662 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess., 34 (1936); see *Panhandle Eastern*, *supra*, at 505, n. 7. And more generally, the legislative history of the NGA is replete with assurances that the Act "takes nothing from the State [regulatory] commissions: they retain all the State power they have at the present time," 81 Cong. Rec. 6721 (1937); see also *Panhandle Eastern*, *supra*, at 509–512, and n. 15—power that included the proration of gas production in aid of conservation and the protection of correlative rights.[9]

In considering whether Kansas in amending paragraph (p) has moved into a field that Congress has marked out for com-

[9] The legislative history of the NGPA also demonstrates that Congress viewed the States' power to prorate production as having survived enactment of the NGPA. The House Energy Committee Chairman told Congress that the NGPA "does not contemplate that FERC will intrude into the traditional conservation functions performed by the states. This is a matter reserved to the state agencies who, in the exercise of their historical powers, will continue to regulate such matters as . . . production rates." 124 Cong. Rec. 38366 (1978).

prehensive and exclusive federal control, we naturally must remember the express jurisdictional limitation on FERC's powers contained in § 1(b) of the NGA. Cf. *Louisiana Public Service Comm'n*, 476 U. S., at 370. That section fences off from FERC's reach the regulation of rates of gas production in "language . . . certainly as sweeping as the wording of the provision declaring . . . [FERC's] role." *Ibid.* The NGA "was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other." *FPC* v. *Panhandle Eastern Pipeline Co.*, 337 U. S., at 513 (footnotes omitted). To avoid encroachment on the powers Congress intended to reserve to the States, we must be careful that we do not "by an extravagant . . . mode of interpretation push powers granted over transportation and rates so as to include production." *Id.*, at 513–514.

To find that Congress occupies the field in which Kansas' regulation operates would be to engage in just such an extravagant interpretation of the scope of federal power. Paragraph (p) is directed to the behavior of gas producers, and regulates their rates of production as a means of exercising traditional state control over the conservation of natural resources and the protection of correlative rights. To be sure, it specifically provides that producers' accrued underages will be canceled if not used within a certain period, and it is expected that this may result in pipelines making purchasing decisions that have an effect on their cost structures and hence on interstate rates. But paragraph (p) operates as one element in a proration scheme of precisely the sort that Congress intended by § 1(b) to leave within a State's authority, and in fact amounts to an effort to encourage producers to extract the allowables assigned under that proration scheme. It would be strange indeed to hold that Congress intended to allow the States to take measures to prorate production and set allowables in furtherance of legiti-

mate conservation goals and in order to protect property rights, but that—because enforcement might have some effect on interstate rates—it did not intend that the States be able to enforce these measures by encouraging actual production of allowables. In analyzing whether Kansas entered a pre-empted field, we must take seriously the lines Congress drew in establishing a dual regulatory system, and we conclude that paragraph (p) is a regulation of "production or gathering" within Kansas' power under the NGA.

By paying due attention to Congress' intent that the States might continue to regulate rates of production in aid of conservation goals and the protection of producers' correlative rights, we may readily distinguish *Northern Natural* and *Transco*, upon which appellant mainly relies.[10] In both those cases we held state regulations requiring gas purchasers to take gas ratably from producers were pre-empted, because they impinged on the comprehensive federal scheme regulating interstate transportation and rates. *Northern Natural*, 372 U. S., at 91–93; *Transco*, 474 U. S., at 422–424. In *Northern Natural*, we held that ratable-take orders "invalidly invade[d] the federal agency's exclusive domain" precisely because they were "unmistakably and unambiguously directed at *purchasers*." 372 U. S., at 92 (emphasis in original).[11] Interstate pipelines operate within the field reserved

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[10] Appellant would also find support for its position in *Schneidewind*. *Schneidewind* held that the NGA pre-empted Michigan's regulation of securities issued by interstate pipelines and other natural gas companies engaged in interstate commerce because the regulation fell within an exclusively federal domain. However, not only was the regulation at issue in that case directed to interstate gas companies, but it also had as its central purposes the maintenance of their rates at what the State considered a reasonable level, and their provision of reliable service. 485 U. S., at 306–309. Unlike Kansas' regulation here, Michigan's could not plausibly be said to operate in the field expressly reserved by the NGA to the States.

[11] We noted in *Northern Natural* that States have alternatives to purchaser-directed ratable-take orders as means of checking waste and dispro-

under the NGA for federal regulation, buying gas in one State and transporting it for resale in another, so inevitably the States are pre-empted from directly regulating these pipelines in such a way as to affect their cost structures. *Ibid.* Likewise in *Transco*, in which we considered whether the rule in *Northern Natural* had survived deregulation of many interstate rates by the NGPA, we held that federal authority over transportation and rates—now expressed in a determination that rates should be unregulated and settled by market forces—continued to occupy the field and to pre-empt state ratable-take orders directed to pipelines and forcing upon them certain purchasing patterns. 474 U. S., at 422–424.

In both *Northern Natural* and *Transco*, States had crossed the dividing line so carefully drawn by Congress in NGA § 1(b) and retained in the NGPA, trespassing on federal territory by imposing purchasing requirements on interstate pipelines. In this case, on the contrary, Kansas has regulated production rates in order to protect producers' correlative rights—a matter firmly on the States' side of that dividing line. To find field pre-emption of Kansas' regulation merely because purchasers' costs and hence rates might be affected would be largely to nullify that part of NGA § 1(b) that leaves to the States control over production, for there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations. Congress has drawn a brighter line, and one considerably more favorable to the States' retention of their traditional powers to regulate rates of production, conserve resources, and protect correlative rights.

B

Congress' decision that the interstate natural gas industry should be subject to a dual regulatory scheme must also in-

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portionate taking, and specifically mentioned "proration and similar orders directed at producers." 372 U. S., at 94–95, n. 12.

form consideration of appellant's claim that paragraph (p) is pre-empted because it conflicts with federal law regulating purchasers' cost structures. Congress has expressly divided regulatory authority between the States and the Federal Government in NGA § 1(b), though the production and interstate transportation and sale of gas "has to operate as a unitary enterprise." *FPC* v. *East Ohio Gas Co.*, 338 U. S. 464, 488 (1950) (Jackson, J., dissenting). It is inevitable that "jurisdictional tensions [will] arise as a result of the fact that [state and federally regulated elements coexist within] a single integrated system," *Louisiana Public Service Comm'n*, 476 U. S., at 375—particularly since gas is often produced under contracts, like those binding many Hugoton producers, that leave it to the purchaser to establish the rate of production through its decisions on takes. In the integrated gas supply system, these jurisdictional tensions will frequently appear in the form of state regulation of producers and their production rates that has some effect on the practices or costs of interstate pipelines subject to federal regulation. Were each such effect treated as triggering conflict pre-emption, this would thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish in § 1(b), and would render Congress' specific grant of power to the States to regulate production virtually meaningless.

Thus, conflict-pre-emption analysis must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role.[12] State regulation of production

[12] Nevertheless, conflict-pre-emption analysis *is* to be applied, even though Congress assigned regulation of the production sphere to the States and Kansas has acted within its assigned sphere. When we declined in *Louisiana Public Service Comm'n* v. *FCC*, 476 U. S. 355 (1986), to reach a claim by the FCC that its regulation of depreciation practices pre-empted state depreciation rules because these were an obstacle to accomplishment of federal objectives, we were faced with a far different situation. In that case, which also involved a dual regulatory scheme, we held that in seek-

may be pre-empted as conflicting with FERC's authority over interstate transportation and rates if it is impossible to comply with both state and federal law; if state regulation prevents attainment of FERC's goals; or if a state regulation's impact on matters within federal control is not an incident of efforts to achieve a proper state purpose. *Schneidewind* v. *ANR Pipeline*, 485 U. S., at 299–300, 308–309. That Kansas sought to protect correlative rights and balance the Hugoton field by regulating producers in such a way as to have some impact on the purchasing decisions and hence costs of interstate pipelines does not without more result in conflict pre-emption; and we are not persuaded that either the particular nature of paragraph (p)'s effect on pipelines' costs or its relationship to the attainment of legitimate state goals creates a conflict with federal law that requires pre-emption.

Northwest Central has not asserted that there exists any conflict so direct that it is impossible for pipelines to comply with both paragraph (p) and with federal regulation of purchasing practices and pricing.[13] It does argue, however, that

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ing to pre-empt state depreciation practices, the FCC had acted in an area over which Congress had explicitly denied it jurisdiction. *Id.*, at 374. Moreover, we recognized in *Louisiana Public Service Comm'n* that the possibility of jurisdictional tensions had been foreseen by Congress, which had established a process designed to resolve such tensions. *Id.*, at 375. In these circumstances, where the FCC lacked jurisdiction to act in the very area in which it was claiming to have power to pre-empt state law, and where in any event the federal statute provided a mechanism for resolving jurisdictional conflicts, a conflict-pre-emption analysis had no proper place. In the present case, however, it is argued that there is a potential for conflict even though each agency acts only within its assigned sphere, and there is no provision in the statute itself to resolve jurisdictional tensions. Only by applying conflict-pre-emption analysis can we be assured that *both* state and federal regulatory schemes may operate with some degree of harmony.

[13] Appellant's brief may conceivably be interpreted as claiming that it is impossible to comply with paragraph (p) and with federal prudent-purchasing requirements. That claim lacks merit for the reasons set out

Kansas' threat to cancel underages prevents the attainment of FERC's regulatory goals. Paragraph (p) imposes no purchasing requirements on pipelines, but simply defines producers' rights to produce gas from the Kansas-Hugoton field. Though Kansas hopes that its redefinition of production rights will increase purchasers' takes from the field, and though increased takes may affect pipelines' costs, *any* regulation of production rates by the States has potential impact on pipeline purchasing decisions and costs, and it is clear that Congress in the NGA intended federal regulation to take account of state laws defining production rights—not automatically to supersede them. *Supra*, at 510–511. Thus the Federal Government assures us that in its continuing regulation of old-gas rates and in its oversight of the prudence of appellant's purchase mix, FERC will recognize Kansas' order as part of the environment in which appellant conducts its business, and will make its own decisions with that in mind. Brief for United States et al. as *Amici Curiae* 21–22.[14] There may be circumstances in which the impact of state regulation of production on matters within federal control is

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at n. 14, *infra*, but also for a more basic reason: paragraph (p) requires *nothing* of pipelines, and a state regulation that imposes no obligations on pipelines obviously cannot make it "impossible" for them to comply with federal law.

[14] Appellant argues that FERC's approval of its purchasing practices in the Kansas-Hugoton field as prudent, *Northwest Central Pipeline Corp.*, 44 FERC ¶61,222 (1988), demonstrates that the KCC rule seeking to prompt a change in those practices conflicts with federal goals. This argument is faulty for two reasons. First, a determination that it was prudent of Northwest Central to preserve low-cost Hugoton gas in favor of filling immediate needs with purchases under take-or-pay contracts in no way implies that it would have been *imprudent* for the pipeline to purchase a different mix of gas. Second, FERC's decision presupposed the continuing availability of stored reserves. *Id.*, at p. 61,825. As explained in the text, the prudence of purchasing mixes varies with the state regulatory environment. A ruling that a mix purchased in one regulatory environment is prudent obviously says little if anything about what would be prudent in a quite different environment.

so extensive and disruptive of interstate commerce in gas that federal accommodation must give way to federal pre-emption, but this is not one of them. Indeed, it appears that if paragraph (p) operates as a spur to greater production of low-cost Hugoton gas, this would be entirely congruous with current federal goals.[15]

The congressionally designed interplay between state and federal regulation under the NGA does not, however, permit States to attempt to regulate pipelines' purchasing decisions in the mere guise of regulating production. See *Schneidewind*, *supra*, at 308–309 (holding pre-empted a state law "whose central purpose is to regulate matters that Congress intended FERC to regulate"). The NGA does not require FERC to regulate around a state rule the only purpose of which is to influence purchasing decisions of interstate pipelines, however that rule is labeled. Such a rule creates a conflict rather than demands an accommodation. Where state law impacts on matters within FERC's control, the State's purpose must be to regulate production or other subjects of state jurisdiction, and the means chosen must at least plausibly be related to matters of legitimate state concern.

In this case, the KCC's avowed purpose in adopting paragraph (p) was to protect the correlative rights of Kansas producers. The protection of correlative rights is a matter traditionally for the States, often pursued through the regulation of production. The production regulation chosen by the KCC—threatening cancellation of underages to encourage pipelines to increase their takes from the Kansas-Hugoton field—was plausibly related to its stated and legiti-

[15] FERC has itself acted to encourage the production of low-cost gas, changing its rules on the abandonment of dedicated reserves to allow producers whose gas is committed to purchasers who do not wish to take it to sell their gas elsewhere, and attempting to give producers access to pipeline systems as a means of transporting their gas to willing buyers. Brief for United States et al. as *Amici Curiae* 4–5, 23. See Pierce, State Regulation of Natural Gas in a Federally Deregulated Market: The Commons Revisited, 73 Cornell L. Rev. 15, 20 (1987).

mate goal of protecting correlative rights. A KCC staff member cogently explained how the KCC believed that the threat permanently to cancel allowables would improve the field's balance and increase the likelihood that producers would eventually be able to extract the gas underlying their leases. *Supra*, at 504–505.

Appellant nevertheless suggests that the KCC's asserted purpose to protect correlative rights of underproduced operators is suspect, because its regulation will worsen correlative rights problems if in fact underages are cancelled. Brief for Appellant 30; Reply Brief for Appellant 5. It is true that if underages are permanently canceled, the producers who suffer cancellation may have less rather than more opportunity to produce the gas underlying their leases prior to the field's exhaustion, absent further meliorative regulation. It is also true that there was some evidence before the KCC suggesting that some pipelines might not increase their takes in response to the possible cancellation of underages, and that correlative rights might thus be harmed as a result of the new regulation. See *Northwest Central Pipeline Corp.* v. *Kansas Corp. Comm'n*, 237 Kan., at 261–262, 699 P. 2d, at 1014. The KCC's assumption that paragraph (p) would likely increase production was not implausible, however, and the Kansas Supreme Court specifically held that although the assumption was "controverted, there is evidence in the record to support [it]." 240 Kan., at 646, 732 P. 2d, at 780.[16] We cannot conclude that paragraph (p) lacks a proper state purpose, nor that it is so weakly related to such purpose that, because of its effect on federally regulated purchasing practices and pricing, it must be pre-empted.

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[16] Changes in paragraph (p) since this litigation began tend to confirm that the KCC is seeking to protect producers' correlative rights. As explained in n. 5, *supra*, the KCC has relaxed its requirements for the reinstatement of underages and made it easier for a producer to sell its gas.

C

Northwest Central further argues that paragraph (p) is pre-empted by federal regulation of the abandonment of natural gas. Section 7(c) of the NGA, 15 U. S. C. § 717f(c), requires that producers who sell natural gas to pipelines for resale in interstate commerce must obtain a certificate of public convenience and necessity from FERC. Section 7(b) of the Act, 15 U. S. C. § 717f(b), obligates certificated producers to continue supplying gas in the interstate market until FERC authorizes an abandonment. See *United Gas Pipe Line Co.* v. *McCombs*, 442 U. S. 529 (1979); *California* v. *Southland Royalty Co.*, 436 U. S. 519, 523–524 (1978).[17] Although the NGPA eliminated FERC's authority to control abandonment of deregulated gas, "old" Hugoton gas remains under FERC's § 7(b) control.[18] Appellant's claims are, first, that a producer's available reserves are a factor in FERC's decision whether to certificate interstate service, and that an abandonment of gas without FERC's approval undercuts FERC's certification process; and, second, that permanent cancellation of underages under paragraph (p) will lead to

[17] Section 7(b) provides:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

We have said that it is "beyond argument" that the proscription of abandoning "any service" rendered by facilities under federal jurisdiction "would include both transportation and sale" of dedicated gas reserves, *United Gas Pipe Line Co.* v. *FPC*, 385 U. S. 83, 87 (1966), and have noted that § 7(b) "simply does not admit of any exception to the statutory procedure." *United Gas Pipe Line Co.* v. *McCombs*, 442 U. S., at 536.

[18] Pursuant to §§ 104, 106(a), and 601(a) of the NGPA, 15 U. S. C. §§ 3314, 3316(a), and 3431(a), "gas reserves dedicated to interstate commerce before November 8, 1978, remain subject to § 7(b) of the Natural Gas Act." *United Gas Pipe Line Co.* v. *McCombs*, *supra*, at 536, n. 9.

drainage from reserves dedicated to interstate commerce to wells operated by currently overproduced operators who supply the intrastate market, thus effectuating the permanent abandonment of gas reserves certificated to the interstate market.

Insofar as appellant's argument is that cancellation of underages pursuant to paragraph (p) will work an abandonment through the noncompensable drainage of dedicated reserves, and that Kansas therefore regulates in a field Congress has fully occupied, it is plainly meritless. This is so even if it is assumed that permanent cancellation of underage will in fact occur under paragraph (p), and that the KCC's belief that purchasers will instead increase their takes proves to have been too optimistic. The KCC's regulation governs the rights of producers to take gas from the Hugoton field, and determining rates of production is a matter squarely within the State's jurisdiction under NGA § 1(b). *Supra*, at 510–511. FERC's abandonment authority necessarily encompasses only gas that operators have a right under state law to produce. Appellant's premise—that the reserves of dedicated leases may not be abandoned without FERC approval—thus fails to support the conclusion it draws, for exactly what the producible reserves underlying a lease at any given moment consist in is a question of state law, settled in Kansas by the KCC's assignment of allowables and by its regulation of tolerances in producing those allowables.[19]

Nor is there merit to appellant's argument interpreted as a claim that paragraph (p) stands as an obstacle to the objective Congress sought to attain when it gave FERC authority over certification and abandonment—"to assure the public a reliable supply of gas." *United Gas Pipe Line Co.* v. *Mc-*

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[19] The United States suggests that appellant's premise is false, as well as its conclusion, because gas is not dedicated and so subject to FERC's abandonment authority until it is actually produced at the wellhead. Brief for United States et al. as *Amici Curiae* 24–25. As appears in the text, we find no need to consider this contention.

Combs, supra, at 536. Unless clear damage to federal goals would result, FERC's exercise of its authority must accommodate a State's regulation of production. Here, Kansas is seeking to ensure that producers in fact have an opportunity to produce all the reserves underlying their leases before the Hugoton field is exhausted, by encouraging timely production. If a producer's gas is dedicated to interstate commerce, the effect Kansas reasonably hopes to achieve by paragraph (p) is that the dedicated gas will in fact be extracted and so will enter interstate commerce. That goal is entirely harmonious with the aim of federal certification and control of abandonment.

III

Northwest Central also argues that paragraph (p) of the Basic Proration Order violates the Commerce Clause. Its first claim is that the KCC's regulation amounts to *per se* unconstitutional economic protectionism. Appellant contends that whatever the pipelines' reactions to the regulation, Kansas interests will benefit, and at the expense of interstate pipelines or of producers in other States. If the threat to cancel underages coerces interstate pipelines into increasing their takes from Kansas-Hugoton producers, those purchasers will have to take less gas from producers in other States. If, on the other hand, interstate pipelines fail to increase their takes in response to paragraph (p), then underages will permanently be canceled, and interstate purchasers will be unable as a result to obtain compensating drainage for the substantial overages that producers for the Kansas intrastate market have accrued. Alternatively, Northwest Central asserts that even if not a *per se* violation of the Commerce Clause, paragraph (p) must nevertheless be struck down upon application of the balancing test set forth in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). Neither argument persuades us.[20]

[20] Northwest Central asserts, as part of its argument that paragraph (p) violates the Commerce Clause, that the KCC has discriminated against interstate purchasers by setting allowables in excess of their market

We have applied a "virtually *per se* rule of invalidity" against state laws that amount to "simple economic protectionism," *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978), and have found such protectionism when a state law "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573, 579 (1986). See also *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 471–472 (1981). On its face, paragraph (p) is neutral, providing for the cancellation of underages of producers irrespective of whether they supply the intrastate or interstate market. In that respect it is entirely unlike the statute we struck down in *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), which required pipelines to meet the demand of local consumers before supplying the interstate market. If paragraph (p) is unconstitutional *per se*, it must therefore be because of its effects.

The effects appellant suggests paragraph (p) might have on interstate commerce would be incident, however, to Kansas' efforts to regulate production to prevent waste and protect correlative rights—under the powers saved to the States in NGA § 1(b), 15 U. S. C. § 717(b),—by prorating production, setting allowables, and encouraging their production. See *supra*, at 510–511. Any regulatory encouragement to produce allowables in a timely manner may impact on a purchaser's distribution of its takes as among the producing States, as the purchaser reacts in light of its contractual and

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demands. Appellant claims this has resulted in large underages for interstate producers, while operators supplying the intrastate market have been able to overproduce and create drainage in their favor; and that the effect of paragraph (p) is to cement this discrimination for all time by preventing interstate operators from producing their underages and so obtaining compensating drainage. We note, however, as did the Kansas Supreme Court, *Northwest Central Pipeline Co.* v. *Kansas Corp. Comm'n*, 237 Kan., at 257, 699 P. 2d, at 1011, that Northwest Central did not in this case challenge the level at which allowables were set, and that the KCC's calculation of allowables is not in issue here.

market situations, and of federal and other States' regulations. Congress cannot but have contemplated that state oversight of production would have some effect on interstate commerce. There would be little point to § 1(b)'s reservation to the States of power over production rates if the inevitable repercussions of States' exercise of this power in the arena of interstate commerce meant a State could not constitutionally enforce its proration orders. We are not prepared to render meaningless Congress' sweeping saving of power over production to the States by holding that a regulation intended to protect correlative rights by encouraging production of allowables, aimed at producers and requiring nothing of purchasers, *per se* violates the dormant Commerce Clause because purchasers have to take it into account in deciding whence to take gas and may as a result increase takes from in-state producers. Cf. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 421–427 (1946) (recognizing Congress' power to specify that state action affecting interstate commerce does not violate the Commerce Clause).

Moreover, current federal policy is to encourage the production of low-cost gas, so that were paragraph (p) to increase takes from Kansas at the expense of States producing more costly gas, this would not according to FERC disrupt interstate commerce, but would improve its efficiency. See *supra*, at 518, and n. 15. "It thus appears that whatever effect the operation of [paragraph (p)] may have on interstate commerce, it is one which it has been the policy of Congress to aid and encourage through federal agencies in conformity to the [NGA and NGPA]." *Parker* v. *Brown*, 317 U. S. 341, 368 (1943). In *Parker*, we rejected a Commerce Clause challenge to a state regulation adopted under powers reserved to the States to control agricultural production. Though the regulation had an effect on interstate commerce, that effect was not "greater than or substantially different in kind from that contemplated by . . . programs authorized by federal statutes." *Ibid.* We held that in light of that congruity, we

could not "say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy or is such as to preclude the state from this exercise of its reserved power to regulate domestic agricultural production." *Ibid.* We reach a similar conclusion here.

It is true that Kansas may fail in its efforts to encourage production of underages by threatening their cancellation, and noncompensable drainage to producers for the intrastate market may occur in consequence, absent further corrective regulation. But whether events will take this turn is a matter of pure speculation, cf. *Brown-Forman Distillers*, *supra*, at 583, contingent upon whether interstate purchasers, analyzing a multitude of market, regulatory, and contractual factors, decide it is economically beneficial to disregard Kansas' incentive timely to produce allowables. The Kansas Supreme Court held that the KCC's assumption that paragraph (p) likely would lead to increased takes by interstate purchasers was supported by evidence in the record, and any diversion of gas to the intrastate markets that might follow the cancellation of underages would be an unwanted, unexpected, and incidental effect of the KCC's legitimate endeavor to regulate production in the service of correlative rights. To strike down the KCC's production regulation as *per se* unconstitutional on the basis of such indirect and speculative effects on interstate commerce "would not accomplish the effective dual regulation Congress intended, and would permit appellant to prejudice substantial local interests. This is not compelled by the . . . Commerce Clause of the Constitution." *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n*, 341 U. S. 329, 337 (1951).

Even if not *per se* unconstitutional, a state law may violate the Commerce Clause if it fails to pass muster under the balancing test outlined in *Pike* v. *Bruce Church, Inc.* Provided the challenged law "regulates evenhandedly to effectuate a legitimate local public interest," however, "and its effects on interstate commerce are only incidental, it will be upheld un-

less the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U. S., at 142. Paragraph (p) of the Hugoton Proration Order applies evenhandedly, without regard to whether a producer supplies the intrastate or interstate market, see *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S., at 471–472, and is an exercise of Kansas' traditional and congressionally recognized power over gas production. The paragraph's intended effect of increasing production from the Hugoton field, even granting that reduced takes from other States would result, is not "clearly excessive" in relation to Kansas' substantial interest in controlling production to prevent waste and protect correlative rights; and the possibility that paragraph (p) may result in the diversion of gas to intrastate purchasers is too impalpable to override the State's weighty interest. We likewise reject Northwest Central's claim that paragraph (p) must be invalidated under *Pike*, *supra*, at 142, because Kansas could have achieved its aims without burdening interstate commerce simply by establishing production allowables in line with Northwest Central's conception of market demand levels. Appellant has not challenged the KCC's determination of allowables, see n. 19, *supra*, and it identifies nothing in the record in this proceeding that could provide an adequate basis for determining that the KCC might have achieved its goals as effectively had it adopted a different formula for setting allowables, with a different approach to calculating market demand.

Paragraph (p) of the KCC's Basic Proration Order for the Hugoton field violates neither the Supremacy nor the Commerce Clause of the Constitution, and the judgment of the Kansas Supreme Court is

Affirmed.

Syllabus

KARAHALIOS *v.* NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1263

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87–636. Argued January 17, 1989—Decided March 6, 1989

Petitioner—a language instructor for the Defense Language Institute, a federal agency—was not a union member but was within a bargaining unit for which respondent union was the exclusive bargaining agent. He was promoted to a reopened "course developer" position, which had previously been occupied by one Kuntelos, who was demoted when the Institute first abolished the position. After respondent agreed to arbitrate on behalf of Kuntelos (who was a member of its board) and successfully argued that the position should be declared vacant for refilling, the Institute reassigned the job to Kuntelos, demoted petitioner, and denied his direct protest. Respondent refused to prosecute petitioner's grievances because of a perceived conflict of interest with its previous Kuntelos advocacy. Petitioner then filed unfair labor practice charges with the Federal Labor Relations Authority (FLRA), alleging, *inter alia*, that respondent had breached its duty of fair representation. The FLRA's General Counsel upheld this charge and ordered that a complaint be issued against respondent, which entered into a settlement whereby it posted notice guaranteeing representation to all employees seeking a single position. When the General Counsel rejected petitioner's contention on appeal that the settlement provided him no relief, he filed a damages suit in the District Court, which held that his charge against respondent was judicially cognizable, since the grant of exclusive union representation contained in the Civil Service Reform Act of 1978 (CSRA or Act) impliedly gives federal employees a private right of action to safeguard their right to fair representation. However, the Court of Appeals reversed the judgment for petitioner, stating that the CSRA's statutory scheme, which creates both an express duty of fair representation and a remedy in the FLRA for infringement of this duty, precludes implication of a parallel right to sue in federal court.

Held: Title VII of the CSRA does not confer on federal employees a private cause of action against a breach by a union representing such employees of its statutory duty of fair representation. Pp. 531–537.

(a) Title VII's express language does not create a private cause of action, and there is nothing in the Act's language, structure, or legislative history from which a congressional intent to provide such a remedy

can be implied. In fact, Title VII's provisions demonstrate that Congress vested exclusive enforcement authority over the duty of fair representation in the FLRA and its General Counsel, since the Title renders a breach of that duty an unfair labor practice, which is adjudicated by the FLRA upon the General Counsel's complaint, and since the Title provides recourse to the courts in only three instances, none of which directly relate to the enforcement of the duty of fair representation. To hold that the district courts must entertain such cases in the first instance would seriously weaken the congressional scheme. Pp. 532–534.

(b) A congressional intent to provide a private CSRA cause of action cannot be implied from that Act's similarities to the National Labor Relations Act (NLRA) and the Railway Labor Act, under which this Court has recognized implicit judicial causes of action to enforce the fair representation duty in the private sector. Unlike the CSRA, neither of those statutes expressly recognizes that duty or provides any administrative remedy for its enforcement. Furthermore, the implication in *Vaca* v. *Sipes*, 386 U. S. 171, of a private NLRA cause of action was intended to preserve courts' pre-existing jurisdiction to enforce the fair representation duty after the National Labor Relations Board tardily assumed jurisdiction, whereas, under the pre-CSRA regulatory scheme, there was no equivalent judicial role. Moreover, *Vaca* and earlier cases stressed that it was critical that unions represent all employees in good faith, since the pertinent statutes deprived bargaining unit employees of their individual rights to bargain by providing for exclusive bargaining agents. In contrast, federal employment does not rest on contract in the private sector sense; the deprivation a federal employee suffers from the election of a bargaining agent—if there is such a deprivation—is not clearly comparable to the private sector predicament; and the collective-bargaining mechanisms created by Title VII do not deprive employees of remedies otherwise provided by statute or regulation. *Vaca* also rested in part on the fact that private collective-bargaining contracts were enforceable in the courts under § 301 of the Labor Management Relations Act, whereas no provision equivalent to § 301 exists in the CSRA. Pp. 534–536.

821 F. 2d 1389, affirmed.

WHITE, J., delivered the opinion for a unanimous Court.

Thomas R. Duffy argued the cause for petitioner. With him on the briefs were *Glenn M. Taubman* and *Todd G. Brower*.

H. Stephen Gordon argued the cause for respondent. With him on the brief were *David Silberman* and *Laurence Gold*.

Richard G. Taranto argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Fried, Deputy Solicitor General Wallace, William E. Persina,* and *Arthur A. Horowitz.**

JUSTICE WHITE delivered the opinion of the Court.

The question before the Court is whether Title VII of the Civil Service Reform Act of 1978 (CSRA or Act), 5 U. S. C. § 7101 *et seq.* (1982 ed. and Supp. IV), confers on federal employees a private cause of action against a breach by a union representing federal employees of its statutory duty of fair representation. Because we decide that Congress vested exclusive enforcement authority over this duty in the Federal Labor Relations Authority (FLRA) and its General Counsel, we agree with the Court of Appeals that no private cause of action exists. Hence we affirm.

Petitioner, Efthimios Karahalios, is a Greek language instructor for the Defense Language Institute/Foreign Language Center, Presidio of Monterey, California (Institute). Karahalios was not a union member but was within a bargaining unit of professional employees for which respondent, the National Federation of Federal Employees, Local 1263 (Union), was the exclusive bargaining agent. In 1976, the Institute reopened its "course developer" position, for which opening Karahalios applied. Previously, the position had been occupied by one Simon Kuntelos, who had been demoted to instructor in 1971, when the Institute first abolished the course developer position. Because Kuntelos declined to seek the reopened job through the competitive application process, Karahalios won the position after scoring 81 on the required examination.

Kuntelos filed a grievance, asserting that the Institute's job award to Karahalios infringed the collective-bargaining agreement, and that Kuntelos should have been assigned the

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**Gregory O'Duden* and *Elaine Kaplan* filed a brief for the National Treasury Employees Union as *amicus curiae* urging affirmance.

position without a competitive application process. The Union agreed to arbitrate on behalf of Kuntelos (a Union board member), and successfully argued that the position be declared vacant for refilling. Because promotion selection procedures had altered, Kuntelos was permitted considerably more time on the examination. He scored 83, and in May 1978, the Institute reassigned the course developer opening to Kuntelos and demoted Karahalios to instructorship status.

The Institute denied Karahalios' direct protest against the substitution; likewise, the Union refused to prosecute his grievances because of a perceived conflict of interest with its previous Kuntelos advocacy. Karahalios filed unfair labor practice charges with the FLRA challenging both adverse decisions: He alleged, first, that the Institute violated its collective-bargaining agreement; and, second, that the Union breached its duty of fair representation. The General Counsel of the FLRA upheld Karahalios' second charge, and ordered that a complaint be issued against the Union. The Union and the FLRA's Regional Director, however, entered into a settlement whereby the Union posted notice guaranteeing representation to all employees seeking a single position. The General Counsel rejected Karahalios' contention on appeal that the settlement provided him no relief.

Karahalios then filed a damages suit in the District Court, restating his charges against the Institute and the Union. The District Court, in its first of three published orders, dismissed on jurisdictional grounds Karahalios' claim against the Institute, but declared judicially cognizable his unfair labor practice charge against the Union. Specifically, the District Court held that 28 U. S. C. § 1331 supports jurisdiction because the CSRA's grant of exclusive union representation impliedly supplies to federal employees a private right of action to safeguard their right to fair representation. After trial, the District Court ruled that the Union's actions—notably its decisions to arbitrate for Kuntelos without consulting,

or even notifying, Karahalios, and, subsequently, to refuse to represent Karahalios—breached its duty of fair representation owed to him. The court confined damages to attorney's fees, however, explaining that both applicants were too similarly matched to allow judicial distinction.

The Court of Appeals reversed, stating that the CSRA's statutory scheme, which creates both an express duty of fair representation and a remedy in the FLRA for infringement of this duty, precludes implication of a parallel right to sue in federal courts. We granted Karahalios' petition for certiorari. 486 U. S. 1041 (1988).

Prior to 1978, labor relations in the federal sector were governed by a 1962 Executive Order administered by a Federal Labor Relations Council whose decisions were not subject to judicial review. *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U. S. 89, 91–92 (1983). Since 1978, Title VII of the CSRA has been the controlling authority. Of particular relevance here, 5 U. S. C. § 7114(a)(1) provides that a labor organization that has been accorded the exclusive right of representing employees in a designated unit "is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership."[1] This provision is "virtually identical" to that found in the Executive Order and is the source of the collective-bargaining agent's duty of fair representation. See *National Federation of Federal Employees, Local 1453*, 23 F. L. R. A. 686, 690 (1986).[2] This duty also

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[1] Section 7114(a)(1) reads, in full: "A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents, and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership."

[2] The Executive Order precursor provision likewise was interpreted to impose on federal unions the duty of fair representation. See *National Federation of Federal Employees, Local 1453*, 23 F. L. R. A., at 690.

parallels the fair representation obligation of a union in the private sector that has been found implicit in the National Labor Relations Act (NLRA), 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.* (1982 ed. and Supp. IV), and the Railway Labor Act (RLA), 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.* See *Vaca* v. *Sipes*, 386 U. S. 171, 180–183 (1967); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 205–207 (1944).

Title VII also makes it clear that a breach of the duty of fair representation is an unfair labor practice, for it provides that it is "an unfair labor practice for a labor organization . . . to otherwise fail or refuse to comply with any provision of this chapter." § 7116(b)(8). Under § 7118, unfair labor practice complaints are adjudicated by the FLRA, which is authorized to order remedial action appropriate to carry out the purposes of Title VII, including an award of backpay against either the agency or the labor organization that has committed the unfair practice.

There is no express suggestion in Title VII that Congress intended to furnish a parallel remedy in a federal district court to enforce the duty of fair representation. The Title provides recourse to the courts in only three instances: with specified exceptions, persons aggrieved by a final FLRA order may seek review in the appropriate court of appeals, § 7123(a); the FLRA may seek judicial enforcement of its orders, § 7123(b); and temporary injunctive relief is available to the FLRA to assist it in the discharge of its duties, § 7123(d).

Petitioner nevertheless insists that a cause of action to enforce the Union's fair representation duty should be implied. Such a claim poses an issue of statutory construction: The "ultimate issue is whether Congress intended to create a private cause of action," *California* v. *Sierra Club*, 451 U. S. 287, 293 (1981) (citations omitted); see also *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 569 (1979). Unless such "congressional intent can be inferred from the language of the statute,

the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Thompson* v. *Thompson*, 484 U. S. 174 (1988). It is also an "elemental canon" of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies. *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U. S. 11, 19 (1979). In such cases, "[i]n the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Authority* v. *Sea Clammers*, 453 U. S. 1, 15 (1981); see also *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U. S. 134, 147 (1985); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 93 (1981).

These guideposts indicate that the Court of Appeals was quite correct in concluding that neither the language nor the structure of the Act shows any congressional intent to provide a private cause of action to enforce federal employees unions' duty of fair representation. That duty is expressly recognized in the Act, and an administrative remedy for its breach is expressly provided for before the FLRA, a body created by Congress to enforce the duties imposed on agencies and unions by Title VII, including the duty of fair representation. Nothing in the legislative history of Title VII has been called to our attention indicating that Congress contemplated direct judicial enforcement of the union's duty. Indeed, the General Counsel of the FLRA was to have exclusive and final authority to issue unfair labor practice complaints, and only those matters mentioned in § 7123 were to be judicially reviewable. H. R. Rep. No. 95–1403, p. 52 (1978). All complaints of unfair labor practices were to be filed with the FLRA. S. Rep. No. 95–969, p. 107 (1978). Furthermore, Title VII contemplates the arbitration of unsettled grievances, but a House proposal that the duty to arbitrate could be enforced in federal court in the first instance

was ultimately rejected. See H. R. Conf. Rep. No. 95–1717, p. 157 (1978). There exists no equivalent to § 301 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, 29 U. S. C. § 185, which permits judicial enforcement of private collective-bargaining contracts.

Petitioner, however, relies on another source to find the necessary congressional intent to provide him with a cause of action. Petitioner urges that Title VII was modeled after the NLRA and that the authority of the FLRA was meant to be similar to that of the National Labor Relations Board (NLRB). Because this Court found implicit in the NLRA a private cause of action against unions to enforce their fair representation duty even after the NLRB had construed the NLRA to make a breach of the duty an unfair labor practice, petitioner argues that Congress must have intended to preserve this judicial role under Title VII. Much of the argument rests on our decision in *Vaca* v. *Sipes*, *supra*. There are, however, several difficulties with this argument.

In the first place, Title VII is not a carbon copy of the NLRA, nor is the authority of the FLRA the same as that of the NLRB. The NLRA, like the RLA, did not expressly make a breach of the duty of fair representation an unfair labor practice and did not expressly provide for the enforcement of such a duty by the NLRB. That duty was implied by the Court because members of bargaining units were forced to accept unions as their exclusive bargaining agents. Because employees had no administrative remedy for a breach of the duty, we recognized a judicial cause of action on behalf of the employee. This occurred both under the RLA, *Steele* v. *Louisville & Nashville R. Co.*, *supra; Trainmen* v. *Howard*, 343 U. S. 768 (1952), and also under the LMRA, *Syres* v. *Oil Workers*, 350 U. S. 892 (1955); *Vaca* v. *Sipes*, *supra*. Very dissimilarly, Title VII of the CSRA not only expressly recognizes the fair representation duty but also provides for its administrative enforcement.

To be sure, prior to *Vaca*, the NLRB had construed §§ 7 and 8(b) of the NLRA to impose a duty of fair representation on union bargaining agents and to make its breach an unfair labor practice. See *Miranda Fuel Co.*, 140 N. L. R. B. 181 (1962), enf. denied, *NLRB* v. *Miranda Fuel Co.*, 326 F. 2d 172 (CA2 1963). The issue in *Vaca*, some years later, was whether, in light of *Miranda Fuel Co.*, the courts still had jurisdiction to enforce the unions' duty. As we understood our inquiry, it was whether Congress, in enacting § 8(b) in 1947, had intended to oust the courts of their role of enforcing the duty of fair representation implied under the NLRA. We held that the "tardy assumption" of jurisdiction by the NLRB was insufficient reason to abandon our prior cases, such as *Syres*.

In the case before us, there can be no mistaking Congress' intent to create a duty previously without statutory basis, and no mistaking the authority of the FLRA to enforce that duty. Also, because the courts played no role in enforcing a union's fair representation duty under Executive Order No. 11491 § 10e, 3 CFR 861 (1966–1970 Comp.), and subsequent amended orders, under the pre-CSRA regulatory regime, there was not in this context any pre-existing judicial role that at least arguably Congress intended to preserve.[3]

Moreover, in *Vaca* and the earlier cases, it was stressed that by providing for exclusive bargaining agents, the pertinent statutes deprived bargaining unit employees of their individual rights to bargain for wages, hours, and working conditions. Hence it was critical that unions be required to represent all in good faith. Again, Title VII operates in a different context. As the United States as *amicus* explains, federal employment does not rest on contract in the private sector sense; nor is it clear that the deprivation a federal employee suffers from the election of a bargaining agent—if

[3] Because such orders were not legislative, courts generally refused judicial enforcement. See, *e. g.*, *Kuhn* v. *National Association of Letter Carriers, Branch 5*, 570 F. 2d 757, 760–761 (CA8 1978).

there is such a deprivation—is comparable to the private sector predicament. Moreover, the collective-bargaining mechanisms created by Title VII do not deprive employees of recourse to any of the remedies otherwise provided by statute or regulation. See the CSRA, 5 U. S. C. §§ 7114(a)(5) and 7121(e)(1).

We also note that *Vaca* rested in part on the fact that private collective-bargaining contracts were enforceable in the federal courts under LMRA § 301. Because unfair representation claims most often involve a claim of breach by the employer and since employers are suable under § 301, the implied fair representation cause of action allows claims against an employer and a union to be adjudicated in one action. Section 301 has no equivalent under Title VII; there is no provision in that Title for suing an agency in federal court.

We therefore discern no basis for finding congressional intent to provide petitioner with a cause of action against the Union. Congress undoubtedly was aware from our cases such as *Cort* v. *Ash*, 422 U. S. 66 (1975), that the Court had departed from its prior standard for resolving a claim urging that an implied statutory cause of action should be recognized, and that such issues were being resolved by a straightforward inquiry into whether Congress intended to provide a private cause of action. Had Congress intended the courts to enforce a federal employees union's duty of fair representation, we would expect to find some evidence of that intent in the statute or its legislative history. We find none. Just as in *United States* v. *Fausto*, 484 U. S. 439, 445 (1988), we held that the CSRA's "integrated scheme of administrative and judicial review" foreclosed an implied right to Court of Claims review, we follow a similar course here. See also *Bush* v. *Lucas*, 462 U. S. 367, 388 (1983). To be sure, courts play a role in CSRA § 7116(b)(8) fair representation cases, but only sitting in review of the FLRA. To hold that the district courts must entertain such cases in the first instance would seriously undermine what we deem to be the congres-

sional scheme, namely to leave the enforcement of union and agency duties under the Act to the General Counsel and the FLRA and to confine the courts to the role given them under the Act.

Accordingly the judgment of the Court of Appeals is

Affirmed.

BLANTON ET AL. *v.* CITY OF NORTH LAS VEGAS, NEVADA

CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 87-1437. Argued January 9, 1989—Decided March 6, 1989

Under Nevada law, a first-time offender convicted of driving under the influence of alcohol (DUI) faces up to six months of incarceration or, in the alternative, 48 hours of community work while identifiably dressed as a DUI offender. In addition, the offender must pay a fine of up to $1,000, attend an alcohol abuse education course, and lose his license for 90 days. Penalties increase for repeat offenders. Petitioners, first-time offenders, were charged with DUI in separate incidents. The Municipal Court denied each petitioner's demand for a jury trial. On appeal, the Judicial District Court again denied petitioner Blanton's request but granted petitioner Fraley's. The Nevada Supreme Court remanded both cases, concluding that the Federal Constitution does not guarantee a right to a jury trial for a DUI offense.

Held: There is no Sixth Amendment right to a trial by jury for persons charged under Nevada law with DUI. This Court has long held that petty crimes or offenses are not subject to the Sixth Amendment jury trial provision. The most relevant criterion for determining the seriousness of an offense is the severity of the maximum authorized penalty fixed by the legislature. Under this approach, when an offense carries a maximum prison term of six months or less, as DUI does under Nevada law, it is presumed to be petty unless the defendant can show that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is a "serious" one. Under this test, it is clear that the Nevada Legislature does not view DUI as a serious offense. It is immaterial that a first-time DUI offender may face a minimum prison term or that some offenders may receive the maximum prison sentence, because even the maximum prison term does not exceed the constitutional demarcation point of six months. Likewise, the 90-day license suspension is irrelevant if it runs concurrently with the prison term. The 48 hours of community service in the specified clothing, while a source of embarrassment, is less embarrassing and less onerous than six months in jail. Also, the $1,000 fine is well below the $5,000 level set by Congress in its most recent definition of a petty

offense, while increased penalties for recidivists are commonplace and are not faced by petitioners. Pp. 541–545.

103 Nev. 623, 748 P. 2d 494, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

John J. Graves, Jr., argued the cause for petitioners. With him on the briefs was *John G. Watkins*.

Mark L. Zalaoras argued the cause for respondent. With him on the brief was *Roy A. Woofter*.*

JUSTICE MARSHALL delivered the opinion of the Court.

The issue in this case is whether there is a constitutional right to a trial by jury for persons charged under Nevada law with driving under the influence of alcohol (DUI). Nev. Rev. Stat. § 484.379(1) (1987). We hold that there is not.

DUI is punishable by a minimum term of two days' imprisonment and a maximum term of six months' imprisonment. § 484.3792(1)(a)(2). Alternatively, a trial court may order the defendant "to perform 48 hours of work for the community while dressed in distinctive garb which identifies him as [a DUI offender]." *Ibid.* The defendant also must pay a fine ranging from $200 to $1,000. § 484.3792(1)(a)(3). In addition, the defendant automatically loses his driver's license for 90 days, § 483.460(1)(c),[1] and he must attend, at his own

Dan C. Bowen and *John A. Powell* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Fried, Acting Assistant Attorney General Dennis, Deputy Solicitor General Bryson, Michael R. Lazerwitz*, and *Louis M. Fischer;* for the State of Nevada by *Brian McKay*, Attorney General, and *Brian Randall Hutchins*, Chief Deputy Attorney General; for the State of New Jersey by *W. Cary Edwards*, Attorney General, and *Boris Moczula, Larry R. Etzweiler*, and *Cherrie Madden Black*, Deputy Attorneys General; for the city of Las Vegas, Nevada, by *George F. Ogilvie;* and for the Louisiana District Attorneys Association by *Dorothy A. Pendergast.*

[1] A restricted license may be issued after 45 days which permits the defendant to travel to and from work, to obtain food and medicine, and to receive regularly scheduled medical care. § 483.490(2).

expense, an alcohol abuse education course. § 484.3792(1)(a)(1). Repeat DUI offenders are subject to increased penalties.[2]

Petitioners Melvin R. Blanton and Mark D. Fraley were charged with DUI in separate incidents. Neither petitioner had a prior DUI conviction. The North Las Vegas, Nevada, Municipal Court denied their respective pretrial demands for a jury trial. On appeal, the Eighth Judicial District Court denied Blanton's request for a jury trial but, a month later, granted Fraley's. Blanton then appealed to the Supreme Court of Nevada, as did respondent city of North Las Vegas with respect to Fraley. After consolidating the two cases along with several others raising the same issue, the Supreme Court concluded, *inter alia*, that the Federal Constitution does not guarantee a right to a jury trial for a DUI offense because the maximum term of incarceration is only six months and the maximum possible fine is $1,000. 103 Nev. 623, 748 P. 2d 494 (1987).[3] We granted certiorari to consider whether petitioners were entitled to a jury trial, 487 U. S. 1203 (1988), and now affirm.

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[2] A second DUI offense is punishable by 10 days to six months in prison. § 484.3792(1)(b). The second-time offender also must pay a fine ranging from $500 to $1,000, *ibid.*, and he loses his driver's license for one year. § 483.460(1)(b)(5). A third DUI offense is punishable by a minimum term of one year's imprisonment and a maximum term of six years' imprisonment. § 484.3792(1)(c). The third-time offender also must pay from $2,000 to $5,000, *ibid.*, and he loses his driving privileges for three years. § 483.460(1)(a)(2).

A prosecutor may not dismiss a DUI charge "in exchange for a plea of guilty or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious" that there is insufficient evidence to prove the offense. § 484.3792(3). Trial courts may not suspend sentences or impose probation for DUI convictions. *Ibid.*

[3] Accordingly, the Supreme Court of Nevada remanded Blanton's case with instructions to proceed without a jury trial. Because Fraley pleaded guilty to DUI before he took an appeal to the District Court, the Supreme Court remanded his case with instructions to reinstate his conviction.

It has long been settled that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." *Duncan* v. *Louisiana*, 391 U. S. 145, 159 (1968); see also *District of Columbia* v. *Clawans*, 300 U. S. 617, 624 (1937); *Callan* v. *Wilson*, 127 U. S. 540, 557 (1888).[4] In determining whether a particular offense should be categorized as "petty," our early decisions focused on the nature of the offense and on whether it was triable by a jury at common law. See, *e. g.*, *District of Columbia* v. *Colts*, 282 U. S. 63, 73 (1930); *Callan*, *supra*, at 555–557. In recent years, however, we have sought more "objective indications of the seriousness with which society regards the offense." *Frank* v. *United States*, 395 U. S. 147, 148 (1969).[5] "[W]e have found the most relevant such criteria in the severity of the maximum authorized penalty." *Baldwin* v. *New York*, 399 U. S. 66, 68 (1970) (plurality opinion); see also *Duncan*, *supra*, at 159. In fixing the maximum penalty for a crime, a legislature "include[s] within the definition of the crime itself a judgment about the seriousness of the offense." *Frank*, *supra*, at 149. The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is "far better equipped to perform the task, and [is] likewise more responsive to changes in attitude and more amenable to the

[4] The Sixth Amendment right to a jury trial applies to the States through the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U. S. 145 (1968).

[5] Our decision to move away from inquiries into such matters as the nature of the offense when determining a defendant's right to a jury trial was presaged in *District of Columbia* v. *Clawans*, 300 U. S. 617, 628 (1937), where we stated: "Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." Our adherence to a common-law approach has been undermined by the substantial number of statutory offenses lacking common-law antecedents. See *Landry* v. *Hoepfner*, 840 F. 2d 1201, 1209–1210 (CA5 1988) (en banc), cert. pending, No. 88–5043; *United States* v. *Woods*, 450 F. Supp. 1335, 1345 (Md. 1978); Brief for United States as *Amicus Curiae* 18.

recognition and correction of their misperceptions in this respect." *Landry* v. *Hoepfner*, 840 F. 2d 1201, 1209 (CA5 1988) (en banc), cert. pending, No. 88–5043.

In using the word "penalty," we do not refer solely to the maximum prison term authorized for a particular offense. A legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense. See *United States* v. *Jenkins*, 780 F. 2d 472, 474, and n. 3 (CA4), cert. denied, 476 U. S. 1161 (1986). We thus examine "whether the length of the authorized prison term *or the seriousness of other punishment* is enough in itself to require a jury trial." *Duncan*, *supra*, at 161 (emphasis added); see also *Frank*, 395 U. S., at 152 (three years' probation is not "onerous enough to make an otherwise petty offense 'serious'").[6] Primary emphasis, however, must be placed on the maximum authorized period of incarceration. Penalties such as probation or a fine may engender "a significant infringement of personal freedom," *id.*, at 151, but they cannot approximate in severity the loss of liberty that a prison term entails. Indeed, because incarceration is an "intrinsically different" form of punishment, *Muniz* v. *Hoffman*, 422 U. S. 454, 477 (1975), it is the most powerful indication of whether an offense is "serious."

Following this approach, our decision in *Baldwin* established that a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months. 399 U. S., at 69; see *id.*, at 74–76 (Black, J., concurring in judgment). The possibility of a sentence exceeding six months, we determined, is "sufficiently severe by itself" to require the opportunity for a jury trial. *Id.*, at 69, n. 6. As for a prison term of six months or less, we recognized that it will seldom be viewed by the defendant as "trivial or 'petty.'" *Id.*, at 73. But we

[6] In criminal contempt prosecutions, "where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense." *Frank*, 395 U. S. at, 149.

found that the disadvantages of such a sentence, "onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications." *Ibid.*; see also *Duncan*, *supra*, at 160.

Although we did not hold in *Baldwin* that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense,[7] and decline to do so today, we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as "petty." A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems "serious" with onerous penalties that nonetheless "do not puncture the 6-month incarceration line." Brief for Petitioners 16.[8]

Applying these principles here, it is apparent that petitioners are not entitled to a jury trial. The maximum authorized prison sentence for first-time DUI offenders does not exceed six months. A presumption therefore exists that the Nevada Legislature views DUI as a "petty" offense for purposes

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[7] We held "*only* that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty.'" *Baldwin* v. *New York*, 399 U. S., at 69, n. 6 (plurality opinion) (emphasis added); see also *Codispoti* v. *Pennsylvania*, 418 U. S. 506, 512, n. 4 (1974).

[8] In performing this analysis, only penalties resulting from state action, *e. g.*, those mandated by statute or regulation, should be considered. See Note, The Federal Constitutional Right to Trial by Jury for the Offense of Driving While Intoxicated, 73 Minn. L. Rev. 122, 149–150 (1988) (nonstatutory consequences of a conviction "are speculative in nature, because courts cannot determine with any consistency when and if they will occur, especially in the context of society's continually shifting moral values").

of the Sixth Amendment. Considering the additional statutory penalties as well, we do not believe that the Nevada Legislature has clearly indicated that DUI is a "serious" offense.

In the first place, it is immaterial that a first-time DUI offender may face a minimum term of imprisonment. In settling on six months' imprisonment as the constitutional demarcation point, we have assumed that a defendant convicted of the offense in question would receive the *maximum* authorized prison sentence. It is not constitutionally determinative, therefore, that a particular defendant may be required to serve some amount of jail time *less* than six months. Likewise, it is of little moment that a defendant may receive the maximum prison term because of the prohibitions on plea bargaining and probation. As for the 90-day license suspension, it, too, will be irrelevant if it runs concurrently with the prison sentence, which we assume for present purposes to be the maximum of six months.[9]

We are also unpersuaded by the fact that, instead of a prison sentence, a DUI offender may be ordered to perform 48 hours of community service dressed in clothing identifying him as a DUI offender. Even assuming the outfit is the source of some embarrassment during the 48-hour period,[10] such a penalty will be less embarrassing and less onerous than six months in jail. As for the possible $1,000 fine, it is well below the $5,000 level set by Congress in its most recent definition of a "petty" offense, 18 U. S. C. § 1 (1982 ed.,

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[9] It is unclear whether the license suspension and prison sentence in fact run concurrently. See Nev. Rev. Stat. § 483.460(1) (1987). But even if they do not, we cannot say that a 90-day license suspension is that significant as a Sixth Amendment matter, particularly when a restricted license may be obtained after only 45 days. Cf. *Frank* v. *United States*, *supra*. Furthermore, the requirement that an offender attend an alcohol abuse education course can only be described as *de minimis*.

[10] We are hampered in our review of the clothing requirement because the record from the state courts contains neither a description of the clothing nor any details as to where and when it must be worn.

Supp. IV), and petitioners do not suggest that this congressional figure is out of step with state practice for offenses carrying prison sentences of six months or less.[11] Finally, we ascribe little significance to the fact that a DUI offender faces increased penalties for repeat offenses. Recidivist penalties of the magnitude imposed for DUI are commonplace and, in any event, petitioners do not face such penalties here.[12]

Viewed together, the statutory penalties are not so severe that DUI must be deemed a "serious" offense for purposes of the Sixth Amendment. It was not error, therefore, to deny petitioners jury trials. Accordingly, the judgment of the Supreme Court of Nevada is

Affirmed.

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[11] We have frequently looked to the federal classification scheme in determining when a jury trial must be provided. See, *e. g.*, *Muniz* v. *Hoffman*, 422 U. S. 454, 476–477 (1975); *Baldwin*, *supra*, at 71; *Duncan*, 391 U. S., at 161. Although Congress no longer characterizes offenses as "petty," 98 Stat. 2027, 2031, 99 Stat. 1728 (repealing 18 U. S. C. § 1), under the current scheme, 18 U. S. C. § 3559 (1982 ed., Supp. V), an individual facing a maximum prison sentence of six months or less remains subject to a maximum fine of no more than $5,000. 18 U. S. C. § 3571(b)(6) (1982 ed., Supp. V).

We decline petitioners' invitation to survey the statutory penalties for drunken driving in other States. The question is not whether other States consider drunken driving a "serious" offense, but whether Nevada does. Cf. *Martin* v. *Ohio*, 480 U. S. 228, 236 (1987). Although we looked to state practice in our past decisions, we did so chiefly to determine whether there was a nationwide consensus on the potential term of imprisonment or amount of fine that triggered a jury trial regardless of the particular offense involved. See, *e. g.*, *Baldwin*, *supra*, at 70–73; *Duncan*, *supra*, at 161.

[12] In light of petitioners' status as first-time offenders, we do not consider whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of a jury trial in a prior DUI prosecution.

BARNARD, CHAIRMAN OF THE COMMITTEE OF BAR EXAMINERS OF THE VIRGIN ISLANDS *v.* THORSTENN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87–1939. Argued January 11, 1989—Decided March 6, 1989*

The District Court of the Virgin Islands' Local Rule 56(b) provides that before an otherwise qualified attorney is admitted to the Virgin Islands Bar, he must "allege and prove to the satisfaction" of the Committee of Bar Examiners that he has "resided in the Virgin Islands for at least one year immediately preceding his proposed admission," and that, "[i]f admitted to practice, he intends to continue to reside in and to practice law in the Virgin Islands." Respondents Thorstenn and DeVos—who do not reside in the Virgin Islands—applied to take the Virgin Islands bar examination, but their applications were rejected because they did not satisfy Rule 56(b)'s residency requirements. They filed suit in the District Court, seeking a declaration that the residency requirements violate the Privileges and Immunities Clause of Art. IV, § 2, of the Constitution, and seeking to enjoin the enforcement of the Rule against them. The court granted summary judgment for petitioners—the Chairman of the Committee of Bar Examiners and the Virgin Islands Bar Association—concluding that the reasons offered for the residency requirements, grounded in the unique conditions in the Virgin Islands, were substantial enough to justify the discrimination against nonresidents. However, the Court of Appeals reversed, ruling that the residency requirements were invalid under *Frazier* v. *Heebe*, 482 U. S. 641, in which this Court invoked its supervisory power to invalidate certain residency requirements of the District Court for the Eastern District of Louisiana. In light of this ruling, the Court of Appeals did not address respondents' claim under the Privileges and Immunities Clause.

Held:

1. The Court will not exercise its supervisory power in this case, since both the nature of the District Court and the reach of its residency requirements implicate interests beyond the federal system. Although it is vested with the jurisdiction of a federal district court, the District Court of the Virgin Islands also has original jurisdiction over certain matters of local law and concurrent jurisdiction with the local courts over

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*Together with No. 87–2008, *Virgin Islands Bar Association* v. *Thorstenn et al.*, also on certiorari to the same court.

certain criminal matters, and serves as an appellate court for decisions rendered by the local courts. Moreover, the application of Rule 56(b) itself extends beyond practice in the federal system to practice before the territorial courts. Pp. 551–552.

2. Rule 56(b)'s residency requirements violate the Privileges and Immunities Clause, since none of the justifications offered in support of the requirements are sufficient to meet petitioners' burden of demonstrating that the discrimination against nonresidents is warranted by a substantial objective and bears a close or substantial relation to such an objective. Pp. 552–558.

(a) Petitioners' contention that the geographical isolation of the Virgin Islands, together with irregular airline and telephone service with the mainland, make it difficult for nonresidents to attend court proceedings held with little advance notice, is an insufficient justification. The Virgin Islands could protect its interests by requiring lawyers who reside at a great distance to retain a local attorney who would be available for unscheduled meetings and hearings. P. 554.

(b) The District Court's finding that the delay caused by trying to accommodate the schedules of nonresident attorneys would increase the massive caseload under which that court suffers is an insufficient justification. Any burden to accommodate nonresidents' travel schedules can be relieved by requiring them to associate with local counsel. Moreover, a Territory to which the Privileges and Immunities Clause applies may not solve the problem of congested court dockets by discriminating against nonresidents. Furthermore, the problem of conflicting court appearances is not unique to the Virgin Islands, and the District Court may make appropriate orders for prompt appearances and speedy trials. Pp. 554–555.

(c) Petitioners' claim that delays in the publication of local law require exclusion of nonresidents because they will be unable to maintain an adequate level of professional competence is unpersuasive. It can be assumed that a lawyer who anticipates sufficient practice in the Virgin Islands to justify taking the bar examination and paying the annual dues will inform himself of the laws of that Territory. Moreover, the fact that the most recent local legal materials are not available on a current basis is no more of a problem for nonresidents than residents. Pp. 555–556.

(d) The contention that the Virgin Islands Bar Association does not have the resources and personnel for adequate supervision of the ethics of a nationwide bar membership is not a sufficient justification, since increased membership brings increased dues revenue, which presumably will be adequate to pay for any additional administrative burdens. Moreover, the problems faced by petitioners in monitoring the ethical conduct of nonresidents are no greater than those faced by any mainland State with limited resources. Pp. 556–557.

(e) Also unavailing is petitioners' argument that the residency requirements are necessary to a strict and fair application of Local Rule 16, which requires each active bar member to be available to accept appointments to appear on behalf of indigent criminal defendants, and which is interpreted by the District Court to require that only the appointed attorney may appear on behalf of the defendant. The strong interests in securing representation for indigents can be protected by allowing an appointed nonresident to substitute a colleague if he is unable to attend a particular appearance. Moreover, in some circumstances it would be detrimental to the goal of competent representation for criminal defendants to require the appointed attorney, whether a resident or nonresident, to appear personally. Rule 16, in fact, explicitly allows the District Court to substitute one appointed counsel for another where the interests of justice require. Petitioners' speculation that resident attorneys will be unwilling to enter into arrangements with nonresidents to make additional appearances when nonresidents are unavailable is insufficient to justify discrimination against nonresidents. If the nonresident fails to make the arrangements necessary to protect the rights of the indigent defendant, the District Court may take appropriate action. Pp. 557–558.

842 F. 2d 1393, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, STEVENS, and SCALIA, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which WHITE and O'CONNOR, JJ., joined, *post*, p. 559.

Maria Tankenson Hodge argued the cause for petitioners in both cases. With her on the briefs were *Vincent A. Colianni* and *Geoffrey W. Barnard, pro se.*

Cornish F. Hitchcock argued the cause for respondents. With him on the brief were *Alan B. Morrison* and *William L. Blum.*†

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†*Godfrey R. de Castro*, Attorney General of the Virgin Islands, *Rosalie Simmonds Ballentine*, Solicitor General, and *Susan Frederick Rhodes*, Assistant Attorney General, filed a brief for the Government of the Virgin Islands as *amicus curiae* urging reversal.

John Cary Sims filed a brief for Paul Hoffman et al. as *amici curiae* urging affirmance in both cases.

JUSTICE KENNEDY delivered the opinion of the Court.

In order to be admitted to the Bar of the District Court of the Virgin Islands, an otherwise qualified attorney must demonstrate that he or she has resided in the Virgin Islands for at least one year and that, if admitted, the attorney intends to continue to reside and practice in the Virgin Islands. The question before us is whether these residency requirements are lawful.

I

Local Rule 56(b) of the District Court of the Virgin Islands provides that before an otherwise qualified attorney is admitted to the Virgin Islands Bar, he must "allege and prove to the satisfaction" of the Committee of Bar Examiners that he has "resided in the Virgin Islands for at least one year immediately preceding his proposed admission to the Virgin Islands Bar," V. I. Code Ann., Tit. 5, App. V., Rule 56(b)(4) (1982); and that, "[i]f admitted to practice, he intends to continue to reside in and to practice law in the Virgin Islands," Rule 56(b)(5). The rule applies not only to practice before the District Court, but also to practice before the local territorial courts.[1]

Respondents Susan Esposito Thorstenn and Lloyd DeVos are attorneys who are members in good standing of the Bars of the States of New York and New Jersey, and who practice law in New York City. Neither respondent resides in the Virgin Islands. In the spring of 1985, respondents applied to take the Virgin Islands bar examination, but their applications were rejected by the Committee of Bar Examiners be-

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[1] This is true because "[t]he Virgin Islands Bar Association [is] an integrated bar association comprising all attorneys admitted to practice in the District Court of the Virgin Islands pursuant to the provisions of Rule 56 . . . ," Rule 51(a), and "[n]o attorney may practice law in the Virgin Islands who is not an active or government member of the Virgin Islands Bar Association . . . ," except pursuant to the provisions in the District Court's rules governing *pro hac vice* participation in litigation and limited participation by inactive members of the bar, Rule 51(b).

cause they did not satisfy the residency requirements of Local Rule 56(b). Respondents filed this suit in the District Court against petitioner Geoffrey W. Barnard, the Chairman of the Committee of Bar Examiners, seeking a declaration that the residency requirements of Rule 56(b) violate the Privileges and Immunities Clause of Article IV of the Constitution, as interpreted by our decision in *Supreme Court of New Hampshire* v. *Piper*, 470 U. S. 274 (1985). Respondents also sought to enjoin the enforcement of Rule 56(b) against them.

On June 21, 1985, while reserving a decision on the merits, the District Court ordered that respondents be allowed to take the bar examination. They took the examination and passed. Petitioner Virgin Islands Bar Association intervened, and all parties submitted motions for summary judgment with supporting affidavits. The District Court granted summary judgment for petitioners, concluding that the reasons offered for Rule 56(b)'s residency requirements, grounded in the unique conditions in the Virgin Islands, were substantial enough to justify the discrimination against nonresidents. App. to Pet. for Cert. 64a–67a.

While the District Court's decision was pending on appeal in the Third Circuit, we decided *Frazier* v. *Heebe*, 482 U. S. 641 (1987), where we invoked our supervisory power to invalidate certain residency requirements contained in the local rules of the United States District Court for the Eastern District of Louisiana. A divided panel of the Court of Appeals reversed the District Court's judgment for petitioners, concluding that the reasons given for Rule 56(b) were in essence the same as those we rejected in *Heebe*. See *Esposito* v. *Barnard*, No. 87–3034 (CA3, Sept. 30, 1987), vacated *sub nom. Thorstenn* v. *Barnard*, 833 F. 2d 29 (1987). The case was reheard en banc, and a majority of the full Court of Appeals agreed with the original panel decision that the residency requirements of Rule 56(b) were invalid under *Heebe*. See 842 F. 2d 1393 (1988). The en banc court emphasized

that alternative and less restrictive means, short of a residency requirement, were available to the District Court to assure that nonresident bar members would bear professional responsibilities comparable to those imposed on resident attorneys. *Id.*, at 1396. In view of its determination that *Heebe* controlled the case, the Court of Appeals did not address respondents' claim under the Privileges and Immunities Clause. 842 F. 2d, at 1397, n. 6.

We granted certiorari, 487 U. S. 1232 (1988), and now affirm.

II

In *Frazier* v. *Heebe*, *supra*, we invoked supervisory power over district courts of the United States to invalidate discriminatory residency requirements for admission to the Bar of the United States District Court for the Eastern District of Louisiana. The Court of Appeals in the case now before us expressed "no doubt" that our supervisory power extends to the bar requirements of the District Court of the Virgin Islands. 842 F. 2d, at 1396.

Without attempting to define the limits of our supervisory power, we decline to apply it in this case. Both the nature of the District Court of the Virgin Islands and the reach of its residency requirements implicate interests beyond the federal system. As to the former, the District Court, which was given its current form and jurisdiction by Congress in the Revised Organic Act of 1954, 68 Stat. 506, see 48 U. S. C. §§ 1611–1616 (1982 ed. and Supp. IV); see generally §§ 1541–1645, is not a United States district court, but an institution with attributes of both a federal and a territorial court. Although it is vested with the jurisdiction of a United States district court, see 48 U. S. C. § 1612(a) (1982 ed., Supp. IV), the District Court also has original jurisdiction over certain matters of local law not vested in the local courts of the Virgin Islands, see § 1612(b), as well as concurrent jurisdiction with the local courts over certain criminal matters, see § 1612(c). It also serves as an appellate court for decisions ren-

dered by the local courts. See 48 U. S. C. § 1613a (1982 ed., Supp. IV). In fact, Congress provides in the Revised Organic Act that, for certain purposes, the District Court "shall be considered a court established by local law." § 1612(b). The application of Rule 56(b) itself similarly extends beyond practice in the federal system. Unlike the rule in *Heebe*, which was confined to practice before the United States District Court, Rule 56(b) applies to admission to the Bar of the Virgin Islands, and so governs practice before the territorial courts. See n. 1, *supra*.

Because these territorial interests are intertwined with the operation of Rule 56, we decline to examine this case as an issue of supervisory power.

III

Respondents also contend that Rule 56(b) violates the Privileges and Immunities Clause of Article IV of the Constitution, which Congress has made applicable to the Virgin Islands in the Revised Organic Act. See 48 U. S. C. § 1561. Petitioners concede that the District Court is an instrumentality of the Government of the Virgin Islands and is subject to the Privileges and Immunities Clause through the Revised Organic Act. Tr. of Oral Arg. 5–6.

Article IV, § 2, of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." When a challenged restriction deprives nonresidents of a privilege or immunity protected by this Clause, it is invalid unless "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Supreme Court of New Hampshire* v. *Piper*, *supra*, at 284; see *Supreme Court of Virginia* v. *Friedman*, 487 U. S. 59, 65 (1988). In deciding whether the discrimination bears a substantial relation to the State's objectives, we con-

sider, among other things, whether less restrictive means of regulation are available. *Piper*, 470 U. S., at 284.

It is by now well settled that the practice of law is a privilege protected by Article IV, § 2, and that a nonresident who passes a state bar examination and otherwise qualifies for practice has an interest protected by the Clause. See *Friedman*, *supra*, at 65; *Piper*, *supra*, at 279–283. We need consider here only whether there are substantial reasons to support treating qualified nonresident attorneys differently, and whether the means chosen by the District Court, total exclusion from the Bar, bear a close or substantial relation to the Territory's legitimate objectives.

Petitioners offer five justifications for the residency requirements of Rule 56(b), which track the reasons recited by the District Court. First, petitioners contend that the geographical isolation of the Virgin Islands, together with irregular airline and telephone service with the mainland United States, will make it difficult for nonresidents to attend court proceedings held with little advance notice. Second, petitioners cite the District Court's finding that the delay caused by trying to accommodate the schedules of nonresident attorneys would increase the massive caseload under which that court suffers. Third, petitioners contend that delays in publication and lack of access to local statutes, regulations, and court opinions will prevent nonresident attorneys from maintaining an adequate level of competence in local law. Fourth, petitioners argue that the Virgin Islands Bar does not have the resources for adequate supervision of a nationwide bar membership. Finally, petitioners exert much energy arguing that the residency requirements of Rule 56(b) are necessary to apply Local Rule 16 in a strict and fair manner. That Rule requires all active members of the Bar to represent indigent criminal defendants on a regular basis. See V. I. Code Ann., Tit. 5, App. V, Rule 16 (1982). We find none of these justifications sufficient to meet the Virgin Island's burden of demonstrating that the discrimination

against nonresidents by Rule 56(b) is warranted by a substantial objective and bears a close or substantial relation to that objective.[2]

The answer to petitioners' first justification, based on the geographical isolation of the Virgin Islands and the unreliable airline and telephone service, is found in *Piper*. In that case, as here, the Bar argued that "[e]ven the most conscientious lawyer residing in a distant State may find himself unable to appear in court for an unscheduled hearing or proceeding." 470 U. S., at 286. We did not find this a sufficient justification for a residency requirement for two reasons. First, we found it likely that a high percentage of nonresidents who took the trouble to take the state bar examination and to pay the annual dues would reside in a place convenient to New Hampshire. *Id.*, at 286–287. Although that observation is not applicable here, we went on to hold in *Piper* that, for lawyers who reside a great distance from New Hampshire, the State could protect its interests by requiring the lawyer to retain a local attorney who will be available for unscheduled meetings and hearings. *Id.*, at 287. The same solution is available to the Virgin Islands. The exclusion of nonresidents from the bar is not substantially related to the District Court's interest in assuring that counsel will be available on short notice for unscheduled proceedings.

Petitioners' second proffered justification is similar to their first. The District Court found that because of its unusually large and increasing caseload, it could not countenance inter-

[2]The District Court decided this case on cross-motions for summary judgment after the parties had submitted affidavits that offered conflicting accounts of, *inter alia*, the ease of travel and communications between the Virgin Islands and the continental United States. See App. 32–46. The Court of Appeals concluded that, in light of the justifications we rejected in *Piper* and *Heebe*, these conflicting affidavits did not create an issue of material fact. See 842 F. 2d 1393, 1395, and n. 3 (CA3 1988). To the extent that any points of factual disagreement are material to our analysis here, we have assumed the facts included in petitioners' affidavits to be true.

ruptions caused by nonresident lawyers attempting to reach the Virgin Islands from the mainland, or conflicts with their appearances on the mainland. To the extent this justification reiterates the point we have addressed above, the same response applies. Any burden on the Virgin Islands court system to accommodate travel schedules of nonresidents can be relieved in substantial part by requiring nonresidents to associate with local counsel. The large caseload of the Virgin Islands District Court does not alter the analysis. Quite aside from the paradox in citing extreme caseload as the reason to exclude more attorneys, it is clear that a State, or a Territory to which the Privileges and Immunities Clause applies, may not solve the problem of congested court dockets by discriminating against nonresidents. Nor do we see the problem of conflicting court appearances as justifying the exclusion of nonresidents from the bar. The problem is not unique to the Virgin Islands. A court in New Jersey may be inconvenienced to some extent by a request to accommodate the conflicting court appearance of a nonresident attorney in New York. But that does not justify closing the New Jersey Bar to New York residents. Further, the District Court may make appropriate orders for prompt appearances and speedy trials.

Nor are we persuaded by petitioners' claim that the delay in publication of local law requires exclusion of nonresidents because they will be unable to maintain an adequate level of professional competence. As we said in *Piper*, we will not assume that "a nonresident lawyer—any more than a resident—would disserve his clients by failing to familiarize himself with the [local law]." *Id.*, at 285. We can assume that a lawyer who anticipates sufficient practice in the Virgin Islands to justify taking the bar examination and paying the annual dues, see *ibid.*, will inform himself of the laws of the Territory. And although petitioners allege that the most recent legal materials, such as District Court opinions and local statutes and regulations, are not available on a current basis,

this does not justify exclusion of nonresidents. If legal materials are not published on a current basis, we do not see how this is more of a problem for nonresidents than residents. All that petitioners allege on this point is that residents can review slip opinions by visiting the offices of the law clerks for the District Court judges. See Affidavit of Patricia D. Steele, App. 45. We do not think it either realistic or practical to assume that residents resort to this practice with regularity, or that nonresidents, faced with the occasional need to do so, cannot find some adequate means to review unpublished materials. We note, moreover, that the record discloses that after the initial affidavits were submitted by petitioners in this case, the Virgin Islands Bar Association Committee on Continuing Legal Education began a subscription service for all opinions of the District Court and the territorial courts, available to all members of the bar. See Affidavit of William L. Blum, App. 51. In short, we do not think the alleged difficulties in maintaining knowledge of local law can justify the drastic measure of excluding all nonresidents as a class.

Petitioners' fourth contention, that the Virgin Islands Bar Association does not have the resources and personnel for adequate supervision of the ethics of a nationwide bar membership, is not a justification for the discrimination imposed here. Increased bar membership brings increased revenue through dues. Each lawyer admitted to practice in the Virgin Islands pays an initial fee of $200 to take the bar examination, annual bar association dues of $100, and an annual license fee of $500. There is no reason to believe that the additional moneys received from nonresident members will not be adequate to pay for any additional administrative burden. To the extent petitioners fear that the Bar will be unable to monitor the ethical conduct of nonresident practitioners, respondents note that petitioners can, and do, rely on character information compiled by the National Conference of Bar Examiners. In this regard, the monitoring problems

faced by the Virgin Islands Bar are no greater than those faced by any mainland State with limited resources.

The final reason offered by petitioners for Rule 56(b)'s residency requirements is somewhat more substantial, though ultimately unavailing. Under District Court Rule 16, each active member of the Virgin Islands Bar must remain available to accept appointments to appear on behalf of indigent criminal defendants. See V. I. Code Ann., Tit. 5, App. V, Rule 16(A) (1982). According to the affidavit of the President of the Virgin Islands Bar Association, each member can expect to receive appointments about four times per year. App. 44. Once appointed, it is the duty of the lawyer "to communicate with the defendant at his place of incarceration as promptly as possible and not later than five days from the date of the clerk's mailing of the order of appointment." Rule 16(B)(f). Although the statute does not specifically so provide, the District Court interprets Rule 16 to require that only the appointed attorney may appear on behalf of the criminal defendant. See App. to Pet. for Cert. 66a. The District Court found that, in light of this individual appearance requirement and the strict time constraints imposed by the Speedy Trial Act, 18 U. S. C. §§ 3161–3174, it would be virtually impossible for this system of appointed counsel to work with nonresident attorneys. App. to Pet. for Cert. 65a–66a.

In *Piper*, we recognized that a State can require nonresidents to share in the burden of representing indigent criminal defendants as a condition for practice before the Bar. 470 U. S., at 287. That, however, is not quite what is at issue here. The question in this case is whether bar admission can be denied to a nonresident because at times it may not be feasible for him to appear *personally* to represent his share of indigent defendants. We determine that this requirement is too heavy a burden on the privileges of nonresidents and bears no substantial relation to the District Court's objective. Petitioners offer no persuasive reason

why the strong interests in securing representation for indigent criminal defendants cannot be protected by allowing an appointed nonresident attorney to substitute a colleague in the event he is unable to attend a particular appearance. Further, contrary to the District Court's characterization of the personal appearance requirement as a hard and fast rule, we must assume that in some circumstances it would in fact be detrimental to the goal of competent representation for criminal defendants to require the appointed attorney, whether a resident or nonresident, to appear personally. For instance, where the bar member is an expert in trusts and estates, but has no prior experience in criminal procedure, it would seem counterproductive to the interests that Rule 16 is designed to serve to require the appointed attorney to make an individual appearance. The text of Rule 16 appears to recognize as much in its explicit provision that, where the interests of justice so require, the District Court may substitute one appointed counsel for another. See V. I. Code Ann., Tit. 5, App. V, Rule 16(B)(j) (1982).

Petitioners' only effort to explain why this seemingly more sensible and less intrusive alternative would not work is to predict that resident attorneys would not be willing to make the additional appearances required where nonresidents are unavailable. Such speculation, however, is insufficient to justify discrimination against nonresidents. As respondents point out, if handling indigent criminal cases is a requirement of admission to the Bar, a nonresident knows that he must either appear himself or arrange with a resident lawyer to handle the case when he is unavailable. If the nonresident fails to make all arrangements necessary to protect the rights of the defendant, the District Court may take appropriate action. This possibility does not, however, justify a blanket exclusion of nonresidents.

IV

In sum, we hold that petitioners neither advance a substantial reason for the exclusion of nonresidents from the

Bar, nor demonstrate that discrimination against nonresidents bears a close or substantial relation to the legitimate objectives of the court's Rule. When the Privileges and Immunities Clause was made part of our Constitution, commercial and legal exchange between the distant States of the Union was at least as unsophisticated as that which exists today between the Virgin Islands and the mainland United States. Nevertheless, our Founders, in their wisdom, thought it important to our sense of nationhood that each State be required to make a genuine effort to treat nonresidents on an equal basis with residents. By extending the Privileges and Immunities Clause to the Virgin Islands, Congress has made the same decision with respect to that Territory.

The residency requirements of Rule 56(b) violate the Privileges and Immunities Clause of Article IV, § 2, of the Constitution, as extended to the Virgin Islands by 48 U. S. C. § 1561. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, dissenting.

In *Supreme Court of New Hampshire* v. *Piper*, 470 U. S. 274 (1985), the Court held that a rule of the New Hampshire Supreme Court which limited bar admission to state residents violated the Privileges and Immunities Clause of Art. IV, § 2. Today the Court extends the reasoning of *Piper* to invalidate a Virgin Islands rule limiting bar admission to attorneys who demonstrate that they have resided in the Virgin Islands for at least one year and will, if admitted, continue to reside and practice there. I agree that the durational residency requirement is invalid under our prior cases dealing with the "right" of interstate travel. *E. g.*, *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). But I cannot agree with the Court's conclusion that the simple residency requirement is invalid under the Privileges and Immunities Clause. Accept-

ing *Piper*'s view of the Privileges and Immunities Clause, I think the unique circumstances of legal practice in the Virgin Islands, as compared to the mainland States, could justify upholding this simple residency requirement even under that view. Because the record reveals the existence of genuine factual disputes about the nature of these circumstances and their relationship to the challenged residency requirement, I would reverse the judgment below and remand for trial on those issues.

Syllabus

COIT INDEPENDENCE JOINT VENTURE *v.* FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER OF FIRSTSOUTH, F. A.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-996. Argued November 1, 1988—Decided March 21, 1989

Due to disagreements about loans to petitioner by FirstSouth, F. A., a federal savings and loan association, petitioner filed suit against FirstSouth in state court, alleging various state law causes of action and seeking damages and equitable relief. Two months later, the Federal Home Loan Bank Board (Bank Board) determined that FirstSouth was insolvent and appointed as receiver the Federal Savings and Loan Insurance Corporation (FSLIC), which substituted itself for FirstSouth in petitioner's suit and removed the case to Federal District Court. That court dismissed the suit for lack of subject matter jurisdiction under *North Mississippi Savings & Loan Assn.* v. *Hudspeth*, 756 F. 2d 1096 (CA5), which held that Congress, by virtue of 12 U. S. C. §§ 1464(d)(6)(C) and 1729(d), had granted FSLIC exclusive jurisdiction to adjudicate claims against the assets of an insolvent savings and loan association under FSLIC receivership, subject only to review by the Bank Board and then to limited judicial review under the Administrative Procedure Act. Shortly before the Court of Appeals affirmed the dismissal on the basis of *Hudspeth*, petitioner, on the day established by FSLIC as the deadline for the filing of creditor claims against FirstSouth, filed its proof of claim for approximately $113 million. Six months later, FSLIC notified petitioner that its claim had been "retained for further review." There has been no further action on the claim.

Held:

1. The statutes governing FSLIC and the Bank Board do not grant FSLIC adjudicatory power over creditors' claims against insolvent savings and loan associations under FSLIC receivership and do not divest the courts of jurisdiction to consider those claims *de novo*. Pp. 572–579.

(a) The plain language of §§ 1729(b) and (d) cannot be read to confer upon FSLIC as receiver the power to *adjudicate* creditors' claims with the force of law. The power granted by § 1729(d) to "settle, compromise, or release" claims is distinguishable from the power to adjudicate and is to some extent inconsistent with it, since a body with the power to say "yes" or "no" with the force of law has little need to settle or compromise. Similarly, § 1729(b)(1)(B)'s directive to FSLIC to "pay all valid

credit obligations" of an insolvent association cannot be read to confer adjudicatory power over claims or to preclude claimants from resorting to the courts for a determination of their claims' validity; it simply empowers FSLIC, much like an ordinary insurance company, to pay claims proved to its satisfaction. The statutory framework in which § 1729 appears demonstrates clearly that when Congress meant to confer adjudicatory authority on FSLIC, it did so explicitly, enacting detailed provisions governing procedural and substantive rights and providing for judicial review. Pp. 572–574.

(b) Judicial resolution of petitioner's state law claims would not "restrain or affect" FSLIC's exercise of its receivership functions in violation of § 1464(d)(6)(C), which states that, "[e]xcept as otherwise provided in this subsection, no court may take any action for or toward the removal of any . . . receiver, or, except at the instance of the Board, *restrain or affect* the exercise of powers or functions of a . . . receiver." This language does not add adjudication of creditor claims to FSLIC's receivership powers, but simply prohibits courts from restraining or affecting FSLIC's exercise of those receivership "powers and functions" that have been granted by other statutory sources, none of which confer adjudicatory power. Moreover, in the context of its relationship to § 1464(d)(6)(A)—which specifies grounds for the Bank Board's appointment of a receiver and authorizes an association placed in receivership to bring a district court suit within 30 days to challenge the appointment—§ 1464(d)(6)(C) must be read simply to prohibit untimely challenges to the receiver's appointment or collateral attacks attempting to restrain the receiver from carrying out its basic functions, and not to divest state and federal courts of subject matter jurisdiction to determine the validity of claims against institutions under a FSLIC receivership. This reading is reinforced by the fact that at the time of the statute's enactment it was well established at common law that suits to establish the validity and amount of a claim against an insolvent debtor in receivership did not interfere with the receiver's powers and functions. *Hudspeth* erred in assuming that such adjudication would "restrain" FSLIC's exercise of its receivership powers by delaying its prompt liquidation of failed savings and loans, since a receiver can make an interim distribution of assets pending the resolution of disputed claims in other courts. Pp. 574–577.

(c) That Congress clearly envisaged that the courts would have subject matter jurisdiction over creditor suits against FSLIC as receiver is demonstrated by several other statutory provisions, including those allowing FSLIC to sue and be sued in any court, § 1725(c)(4), and establishing a statute of limitations for actions against FSLIC to enforce deposit insurance claims, § 1728(c). Most significantly, § 1730(k)(1) pro-

vides an explicit grant of subject matter jurisdiction that clearly contemplates creditors' state court suits against FSLIC as receiver for state-chartered associations. There is no indication that Congress intended to treat federally chartered associations differently in this respect. Pp. 577–579.

2. Creditors are not required to exhaust the Bank Board's current administrative claims procedure before bringing suit because that procedure does not place a reasonable time limit on FSLIC's consideration of creditors' claims. Pp. 579–587.

(a) Under the current claims procedure, the entire process for a claimant whose claim is not allowed in full could take well over a year from the time the claim is first filed with FSLIC until the Board completes its final review. Moreover, because the claims procedure places no time limit on FSLIC's consideration of claims retained for "further review," the length of time for such claims could be far longer and even indefinite. Nevertheless, the claims procedure specifies that judicial review is available only after exhaustion of these administrative procedures. Pp. 579–583.

(b) Although the statutes governing FSLIC and the Bank Board do not explicitly mandate exhaustion of administrative remedies, it would be a reasonable exercise of the Board's broad power to make rules for the conduct of receiverships, § 1464(d)(11), and it would be entirely consistent with Congress' clear intent that FSLIC liquidate failed associations "in an orderly manner," § 1729(b)(1)(A)(v), if the Board's regulations only required that claimants give FSLIC notice of their claims and then wait for a reasonable period of time before filing suit while FSLIC decided whether to pay, settle, or disallow the claims. The Board reasonably could decide that FSLIC simply cannot perform its statutory function unless it is notified of the entire array of claims against a failed association's assets and has a reasonable period of time to make rational and consistent judgments regarding those claims. Pp. 583–585.

(c) However, the present claims procedure exceeds the Bank Board's statutory authority by not placing a clear and reasonable time limit on FSLIC's consideration of claims. The lack of such a reasonable limit renders the claims procedure inadequate, because it allows FSLIC to delay the administrative processing of claims indefinitely, thereby denying litigants their day in court while the statute of limitations runs; because it may enable FSLIC to coerce unfair settlements by virtue of the fact that the receiver's assets may be depleted by other, interim distributions before the claimant gets to court; and because FSLIC itself is often the main creditor and thus may well have an incentive to delay decisions on large claims such as petitioner's. Because an inadequate administrative remedy need not be exhausted, petitioner may pro-

ceed directly to court for a *de novo* determination on the merits of its state law claims. Pp. 586–587.

829 F. 2d 563, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court with respect to Parts I, II, and III, and the opinion of the Court with respect to Part IV, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, STEVENS, and KENNEDY, JJ., joined. BLACKMUN, J., *post*, p. 588, and SCALIA, J., *post*, p. 588, filed opinions concurring in part and concurring in the judgment.

Robert E. Goodfriend argued the cause for petitioner. With him on the briefs was *Paul E. Galvin.*

Jeffrey P. Minear argued the cause for respondent. With him on the brief were *Solicitor General Fried* and *Deputy Solicitor General Cohen.**

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether Congress granted the Federal Savings and Loan Insurance Corporation (FSLIC), as receiver, the exclusive authority to adjudicate the state law claims asserted against a failed savings and loan association. We hold that Congress did not grant FSLIC such power and that the creditors of a failed savings and loan association are entitled to *de novo* consideration of their claims in court. We also hold that creditors are not required to exhaust FSLIC's current administrative claims procedure before filing suit because the lack of a clear time limit on FSLIC's consideration of claims renders the administrative procedure inadequate.

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*Briefs of *amici curiae* urging reversal were filed for the United States League of Savings Institutions by *Arthur W. Leibold, Jr.*, *Bruce A. Cohen*, *Alan Rosenblat*, and *Thomas A. Pfeiler;* for Joseph M. Hudspeth by *Wylene W. Dunbar;* and for George S. Watson et al. by *Irwin Goldbloom*, *Maureen E. Mahoney*, and *C. Westbrook Murphy.*

Kenneth S. Geller and *Kathryn A. Oberly* filed a brief for the Federal Home Loan Bank of Dallas et al. as *amici curiae* urging affirmance.

Kathleen E. Topelius and *Wendy B. Samuel* filed a brief for the National Council of Savings Institutions as *amicus curiae.*

I

From 1983 to 1986, Coit Independence Joint Venture (Coit), a real estate concern, borrowed money from FirstSouth, F. A., a federal savings and loan association. Subsequent disagreements led Coit to file suit against FirstSouth in October 1986 in the 95th Judicial District Court of Dallas County, Texas. In its state court complaint, Coit alleged that it had received two loans of $20 million and $30 million to purchase two parcels of undeveloped land. Coit alleged that FirstSouth had required it to pay a "profit participation" interest in any profits derived from sale of the property as a condition of receiving the loans. Coit asserted that this "profit participation" fee was interest that, when added to the regular accrued interest rate, made the loans usurious under Texas law. Complaint ¶¶ 4–13, App. 17–22. Coit also alleged that FirstSouth orally agreed to allow Coit to draw down funds to improve the property purchased with the $30 million loan, and to carry the loan, by executing any necessary renewal notes, for at least five years unless the property was sold earlier. Coit charged that FirstSouth violated this agreement in August 1986 by refusing to renew the notes and threatening to foreclose on the property.

Coit sought damages from FirstSouth for usury. Alternatively, Coit sought a declaratory judgment that FirstSouth was Coit's partner by virtue of its profit sharing interest in the joint venture and that FirstSouth had breached its fiduciary duty and its implied duty of good faith and fair dealing. Complaint ¶¶ 11–16, App. 21–23. Coit also sought a declaration that any outstanding note was unenforceable.

On December 4, 1986, two months after Coit filed suit in state court, the Federal Home Loan Bank Board (Bank Board) determined that FirstSouth was insolvent and appointed FSLIC as receiver. Substituting itself for FirstSouth in Coit's state suit, FSLIC removed the case to federal court. In February 1987, the District Court dismissed the suit for lack of subject matter jurisdiction, relying on *North*

Mississippi Savings & Loan Assn. v. *Hudspeth*, 756 F. 2d 1096 (CA5 1985), cert. denied, 474 U. S. 1054 (1986).

In *Hudspeth*, the Court of Appeals for the Fifth Circuit held that FSLIC has exclusive jurisdiction to adjudicate claims against the assets of an insolvent savings and loan association placed in a FSLIC receivership, subject first to review by the Bank Board and then to judicial review under the Administrative Procedure Act. 756 F. 2d, at 1103. The *Hudspeth* court relied on two statutory provisions in reaching this conclusion. First, 12 U. S. C. § 1464(d)(6)(C) states that "[e]xcept as otherwise provided in this subsection, no court may . . . except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver." Second, 12 U. S. C. § 1729(d) provides that "[i]n connection with the liquidation of insured institutions, [FSLIC] shall have power . . . to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board." The *Hudspeth* court reasoned that Congress, by these provisions, intended that FSLIC should be able to act quickly in liquidating failed institutions and "not be interfered with by other judicial or regulatory authorities." 756 F. 2d, at 1101.

The Fifth Circuit rejected Hudspeth's argument that adjudication of claims against a debtor, as opposed to allocation of assets to satisfy those claims, is not a receivership function, and thus that judicial resolution of claims would not "restrain or affect" FSLIC's powers as receiver. The court reasoned that judicial "resolution of even the facial merits of claims . . . would delay the receivership function of distribution of assets" and that "such a delay is a 'restraint' within the scope of the statute." *Id.*, at 1102. The court found further support for its reading of the statute in the Board's regulations giving FSLIC the power to disallow claims not "proved to its satisfaction," 12 CFR §§ 549.4, 569a.8 (1988),

which the court took to mean the power to adjudicate claims. 756 F. 2d, at 1102, and n. 5.

Since *Hudspeth* was decided, FSLIC has successfully urged state and federal courts to dismiss a broad variety of claims for lack of subject matter jurisdiction. Those creditor claims have included contract and tort claims, see, *e. g.*, *Resna Associates, Ltd.* v. *Financial Equity Mortgage Corp.*, 673 F. Supp. 1371, 1372 (NJ 1987), alleged antitrust violations, *Red Fox Industries, Inc.* v. *FSLIC*, 832 F. 2d 340 (CA5 1987), and even racketeering claims, *Baer* v. *Abel*, 637 F. Supp. 343, 347 (WD Wash. 1986).

In the instant case, Coit appealed the District Court's dismissal of its case for lack of subject matter jurisdiction to the Fifth Circuit. That court acknowledged that since *Hudspeth* was decided two other courts had held that Congress did not intend FSLIC to enjoy exclusive jurisdiction over creditors' state law claims against savings and loan associations under FSLIC receivership. *Morrison-Knudsen Co.* v. *CHG International, Inc.*, 811 F. 2d 1209 (CA9 1987), cert. dism'd *sub nom. FSLIC* v. *Stevenson Assocs.*, 488 U. S. 935 (1988); *Glen Ridge I Condominiums, Ltd.* v. *FSLIC*, 734 S. W. 2d 374 (Tex. App. 1986), writ of error denied, 750 S. W. 2d 757 (Tex. 1988), cert. pending, No. 88–659. However, the Fifth Circuit held that it was bound by *Hudspeth* and affirmed the District Court's dismissal of Coit's suit. The court also concluded that Coit's constitutional challenges to exclusive FSLIC jurisdiction were not ripe for review. *Coit Independence Joint Venture* v. *FirstSouth, F. A.*, 829 F. 2d 563, 565 (1987).

On September 28, 1987, the deadline established by FSLIC for the filing of creditor claims against FirstSouth, Coit filed its proof of claim with FSLIC for approximately $113 million. Six months later, FSLIC notified Coit that its claim had been "retained for further review." There has been no further action on Coit's claim.

We granted certiorari to resolve the conflict in the lower courts over whether FSLIC has exclusive authority to adjudicate the validity of creditors' state law claims against failed savings and loan associations under a FSLIC receivership. 485 U. S. 933 (1988). We now reverse.

II

Resolution of this case requires us to interpret statutory provisions governing FSLIC and the Bank Board that were enacted over a span of 50 years. Moreover, those provisions are embedded in a complex statutory framework. Prior to the Great Depression of the 1930's, savings and loan associations were chartered and regulated by the States alone. However, in the face of heavy withdrawals from savings accounts, mortgage loan defaults, and limited funds for home mortgages during the depression, Congress passed the Federal Home Loan Bank Act, 47 Stat. 725, now codified, as amended, 12 U. S. C. § 1421 *et seq.* That Act provided for the creation of up to 12 federal home loan banks throughout the country whose function was to loan money to savings and loan associations and to certain other mortgage lenders. 47 Stat. 726, 12 U. S. C. § 1423. The Act also created the Federal Home Loan Bank Board to oversee the 12 home loan banks and to raise funds for them by selling bonds. 47 Stat. 736, 12 U. S. C. § 1437. See T. Marvell, The Federal Home Loan Bank Board 20 (1969).

One year later, Congress enacted the Home Owners' Loan Act of 1933 (HOLA), which empowered the Bank Board to organize, regulate, and charter federal savings and loan associations. 48 Stat. 128, as amended, 12 U. S. C. § 1461 *et seq.* The HOLA also gave the Bank Board the power to prescribe rules and regulations for the "reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association." HOLA, § 5(d), 48 Stat. 133, now codified, as amended, 12 U. S. C. § 1464(d)(11).

In 1934, Congress established FSLIC to insure the accounts of all federal savings and loan associations and certain state-chartered associations. National Housing Act (NHA), § 402(a), 48 Stat. 1256, as amended, 12 U. S. C. § 1725(a). If an insured institution was in default, FSLIC was required by the NHA to either pay depositors the insured amount of their account or to transfer the insured account to an insured institution not in default. NHA, § 405(b), 48 Stat. 1259, as amended, 12 U. S. C. § 1728(b). If a federal savings and loan association was in default, FSLIC was to be appointed conservator or receiver and was authorized "(1) to take over the assets of and operate such association, (2) to take such action as may be necessary to put it in sound and solvent condition, (3) to merge it with another insured institution, (4) to organize a new Federal savings and loan association to take over its assets, or (5) to proceed to liquidate its assets in an orderly manner, whichever shall appear to be to the best interests of the insured members of the association in default; and in any event [FSLIC] shall pay the insurance as provided in section 405 and all valid credit obligations of such association." NHA, § 406(b), 48 Stat. 1260, now codified, as amended, 12 U. S. C. § 1729(b)(1). FSLIC could also accept appointment as receiver of a state-chartered insured institution, assuming the same powers and duties as those with respect to a federal institution. NHA, § 406(c), 48 Stat. 1260, as amended, 12 U. S. C. § 1729(c)(1)(A). In the event that FSLIC liquidated a failed savings and loan, the NHA provided:

> "[FSLIC] shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public

authority having jurisdiction over the matter." NHA, § 406(d), 48 Stat. 1260, now codified, as amended, 12 U. S. C. § 1729(d).

In the Housing Act of 1954, Congress amended both the NHA and the HOLA. The Housing Act amended § 5(d) of the HOLA by setting forth specific grounds for the Bank Board's appointment of a conservator or receiver for a federal savings and loan association, such as insolvency, violation of law or regulation, concealment of books or records, and unsound operation. Housing Act of 1954, § 503, 68 Stat. 635–636, as amended, 12 U. S. C. § 1464(d)(6)(A). The Housing Act required formal administrative hearings, subject to judicial review under the Administrative Procedure Act, before a conservator or receiver could be appointed. § 503, 68 Stat. 636.

The first major amendments to the 1934 NHA were made in the Financial Institutions Supervisory Act of 1966 (FISA), Pub. L. 89–695, 80 Stat. 1028, 1036, now codified, as amended, 12 U. S. C. §§ 1464, 1730 (1982 and Supp. V). This Act gave the Bank Board a more flexible array of enforcement powers, short of placing thrifts in receivership or terminating their insurance, to prevent insured institutions from violating laws or regulations or engaging in unsafe and unsound practices. The FISA also gave the Bank Board authority, with respect to federal savings and loan associations, to appoint a conservator or receiver *ex parte* and without notice if certain grounds existed, including insolvency, substantial dissipation of assets due to violations of law or unsafe or unsound practices, willful violation of a cease-and-desist order, or concealment of books, papers, records, or assets. FISA, 80 Stat. 1032–1033, 12 U. S. C. § 1464(d)(6)(A).

If the Bank Board appointed a conservator or receiver, the savings and loan association could, within 30 days, bring an action in United States district court "for an order requiring the Board to remove such conservator or receiver." *Ibid.*

It is in this context that the following language, relied on by the Fifth Circuit in *Hudspeth*, first appeared:

> "Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver." FISA, 80 Stat. 1033, 12 U. S. C. § 1464(d)(6)(C).

The FISA also added greater scope to the Bank Board's power to make rules and regulations, including rules and regulations governing the liquidation of failed savings and loan associations and the conduct of receiverships. FISA, 80 Stat. 1035, 12 U. S. C. § 1464(d)(11).

Subsequent statutes have extended the Bank Board's power to appoint FSLIC as receiver of insolvent state-chartered thrifts. See Bank Protection Act of 1968, Pub. L. 90–389, § 6, 82 Stat. 295–296, as amended, 12 U. S. C. §§ 1729(c)(2), 1729(c)(3); Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97–320, § 122(d), 96 Stat. 1482, 12 U. S. C. § 1729(c)(1)(B); Competitive Equality Banking Act of 1987, Pub. L. 100–86, § 509(a), 101 Stat. 635, note following 12 U. S. C. § 1464 (1982 ed., Supp. V).

Once FSLIC is appointed receiver of an insolvent savings and loan association, FSLIC steps into the shoes of the association and takes control of its assets. If FSLIC liquidates the association, it must promptly reimburse insured depositors out of its insurance fund. 12 U. S. C. § 1728(b). If FSLIC is not satisfied regarding the validity of a depositor's claim, "it may require the final determination of a court of competent jurisdiction before paying such claim." *Ibid.* FSLIC then satisfies the claims of uninsured creditors to the extent that the association's assets permit it to do so. Because FSLIC is subrogated to the rights of the insured depositors whom it has reimbursed, FSLIC is normally the single largest claimant against the assets of a failed savings and

loan association and generally recoups a substantial portion of its insurance payouts from those assets. See *Morrison-Knudsen Co.*, 811 F. 2d, at 1215–1216; Note, 10 W. New Eng. L. Rev. 227, 229–230 (1988).

III

Coit argues that *Hudspeth* incorrectly held that Congress granted FSLIC adjudicatory power over creditors' claims against failed savings and loan associations under FSLIC receivership, subject only to limited judicial review in the courts under the Administrative Procedure Act, 5 U. S. C. § 551 *et seq.* Although FSLIC argued below, invoking *Hudspeth*, that the District Court lacked subject matter jurisdiction over Coit's claims, the Solicitor General does not endorse that position. See Brief for Respondent 16, 17, 20, and n. 13, 39–40. Respondent concedes both that "the power conferred by HOLA and the NHA should not be characterized as a power of 'adjudication,'" *id.*, at 17, and that the District Court had subject matter jurisdiction over Coit's claim.[1] *Id.*, at 16–17, 39. Respondent also acknowledged at oral argument that a creditor suing in court is entitled to a "de novo determination" of its claim. Tr. of Oral Arg. 36. We agree. The statutes governing FSLIC and the Bank Board do not grant FSLIC adjudicatory power over creditors' claims against insolvent savings and loan associations under FSLIC receivership, nor do they divest the courts of jurisdiction to consider those claims *de novo*.

A

Congress granted FSLIC various powers in its capacity as receiver, but they do not include the power to adjudicate creditors' claims. Section 406 of the NHA conferred upon

[1] Respondent recognized at oral argument that FSLIC and the Bank Board do not necessarily agree with the Solicitor General on "every point" and may still be arguing cases in the lower courts on the jurisdictional theory. Tr. of Oral Arg. 56.

FSLIC the traditional powers of a receiver "to settle, compromise, or release claims in favor of or against the insured institutio[n]," 12 U. S. C. § 1729(d), and to "pay all valid credit obligations of the association," § 1729(b)(1)(B). Those essential functions of FSLIC as receiver have not changed since the enactment of the NHA in 1934. The plain language of §§ 1729(b) and 1729(d) cannot be read to confer upon FSLIC the power to *adjudicate* disputes with the force of law. The power to "settle, compromise, or release" claims both is distinguishable from the power to adjudicate and is to some extent inconsistent with it. As the Ninth Circuit reasoned in *Morrison-Knudsen Co.*, 811 F. 2d, at 1219:

> "Settlement and compromise strongly suggest the presence of the power of the other party to take the dispute to court. Settlement and compromise are to avoid that result. A body with the power to say 'yes' or 'no' with the force of law has much less need to settle or to compromise."

Similarly, the directive that FSLIC as receiver "shall pay all valid credit obligations of the association" cannot be read to confer upon FSLIC the power to adjudicate claims against an insolvent savings and loan association subject only to review under the Administrative Procedure Act. This provision simply empowers FSLIC, much like an ordinary insurance company, to pay those claims proved to its satisfaction. It does not give FSLIC the power to adjudicate claims with the force of law; nor does it preclude claimants from resorting to the courts for a determination of the validity of their claims.

Moreover, §§ 1729(b) and 1729(d) do not exist in isolation, but are embedded within a complex statutory framework. *Stafford* v. *Briggs*, 444 U. S. 527, 535 (1980) ("'[I]t is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute'") (quoting *Brown* v. *Duchesne*, 19 How. 183, 194 (1857)). The

statutory framework in which § 1729 appears indicates clearly that when Congress meant to confer adjudicatory authority on FSLIC it did so explicitly and set forth the relevant procedures in considerable detail. For example, in its role as supervisor of ongoing thrift institutions, FSLIC together with the Bank Board is empowered to adjudicate violations of federal law, to issue cease-and-desist orders, to remove officers and directors, and to impose civil sanctions. See 12 U. S. C. §§ 1464(d), 1730. The statutory provisions that confer this authority set forth with precision the agency procedures to be followed and the remedies available, with explicit reference to judicial review under the Administrative Procedure Act. See 12 U. S. C. §§ 1464(d)(7)(A), 1730(j)(2). It is thus reasonable to infer that if Congress intended to confer adjudicatory authority upon FSLIC in its receivership capacity, it would have enacted similar provisions governing procedural and substantive rights and providing for judicial review.

B

The *Hudspeth* decision rested primarily on 12 U. S. C. § 1464(d)(6)(C). That provision, introduced in 1966 as § 101 of the FISA, 80 Stat. 1033, states that "[e]xcept as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, *restrain or affect* the exercise of powers or functions of a conservator or receiver." (Emphasis added.) The *Hudspeth* court reasoned that judicial "resolution of even the facial merits of claims . . . would delay the receivership function of distribution of assets" and that "such a delay is a 'restraint' within the scope of the statute." 756 F. 2d, at 1102. We disagree.

First, this language does not add adjudication of creditor claims to FSLIC's receivership powers. It simply prohibits courts from restraining or affecting FSLIC's exercise of those receivership "powers and functions" that have been granted by other statutory sources. As discussed above,

none of the statutes governing FSLIC and the Bank Board confer upon FSLIC the power to adjudicate claims against an insolvent savings and loan over which FSLIC has been appointed receiver.

Second, when the statutory context in which the provision appears is examined, it is clear that it does not have the meaning that *Hudspeth* attributed to it. Section 1464(d)(6)(A) sets forth the specific grounds for appointment of a receiver by the Bank Board and expressly authorizes associations placed in receivership to bring suit within 30 days in United States district court to challenge the receiver's appointment. Following the provision for a court challenge to remove the receiver comes the statutory language prohibiting courts, "[e]xcept as otherwise provided in this subsection," from taking any action to remove the receiver or to "restrain or affect" the exercise of the receiver's "powers or functions." When read in its statutory context, this provision prohibits untimely challenges to the receiver's appointment or collateral attacks attempting to restrain the receiver from carrying out its basic functions. It does not divest state and federal courts of subject matter jurisdiction to determine the validity of claims against institutions under a FSLIC receivership. See Note, 10 W. New Eng. L. Rev., at 257–260; Baxter, Life in the Administrative Track: Administrative Adjudication of Claims Against Savings Institution Receiverships, 1988 Duke L. J. 422, 484–485.

That the "restrain or affect" language should not be read to preclude *de novo* court adjudication of the validity of creditors' claims against savings and loans in receivership is reinforced by the fact that at the time of the statute's enactment it was well established at common law that suits establishing the existence or amount of a claim against an insolvent debtor did not interfere with or restrain the receiver's possession of the insolvent's assets or its exclusive control over the distribution of assets to satisfy claims. *Morris* v. *Jones*, 329 U. S.

545, 549 (1947); *Riehle* v. *Margolies*, 279 U. S. 218, 224 (1929). As this Court discussed in *Morris:*

> "No one can obtain part of the assets or enforce a right to specific property in the possession of the liquidation court except upon application to it. But proof and allowance of claims are matters distinct from distribution. . . . 'The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding *in personam.*' The establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have." 329 U. S., at 549 (citations omitted).

Moreover, suits to establish the validity and amount of a claim against an insolvent national bank under a statutory receivership were not seen as interfering with the powers or functions of the receiver. See *Bank of Bethel* v. *Pahquioque Bank*, 14 Wall. 383, 401–402 (1872).

Looking to the practical effects of court adjudication on the receivership process, the *Hudspeth* court erroneously assumed that such adjudication would "restrain" FSLIC's exercise of its receivership powers by delaying its prompt liquidation of failed savings and loans. As this Court held in *Riehle* v. *Margolies*, a receiver's distribution of assets need not be postponed pending the resolution of disputed claims in other courts: "The power to fix the time for distribution may include the power . . . to decline to postpone distribution awaiting disposition of litigation in another court over a contested claim." 279 U. S., at 224. See also 3 R. Clark, Law and Practice of Receivers § 649(c) (3d ed. 1959). Indeed, the Bank Board's own regulations provide for interim distributions. See 12 CFR § 549.4(d) (1988) (allowing creditor claims to be paid by the receiver "from time to time, to the extent funds are available, in such manner and amounts as the Board may direct").

Finally, even if court adjudication of creditor claims delayed the distribution of assets and thereby constituted a "restraint" on FSLIC's receivership functions, *Hudspeth* provides no explanation for why the delay resulting from judicial review of FSLIC's administrative claims procedure would constitute any less of a "restraint." In sum, judicial resolution of Coit's state law claims against FSLIC as receiver for FirstSouth simply would not "restrain or affect" FSLIC's exercise of its receivership functions within the meaning of § 1464(d)(6)(C).

C

Several provisions of the NHA indicate that Congress clearly envisaged that the courts would have jurisdiction over suits by creditors against FSLIC as receiver. When it established FSLIC in 1934, Congress provided that FSLIC could "sue and be sued, complain and defend, in any court of law or equity, State or Federal." NHA, § 402(c)(4), 48 Stat. 1256, now codified, as amended, 12 U. S. C. § 1725(c)(4). Moreover, in the Housing Act of 1954, Congress amended the NHA to establish a statute of limitations for actions against FSLIC to enforce deposit insurance claims, which were the most common type of claim in any thrift liquidation at the time. Housing Act of 1954, § 501(2), 68 Stat. 633, 12 U. S. C. § 1728(c). Most significantly, in 1966, in the very statute that contained the "restrain or affect" language of 12 U. S. C. § 1464(d)(6)(C), Congress provided an explicit grant of subject matter jurisdiction to the courts that clearly envisaged suits by creditors against FSLIC as receiver:

> "Notwithstanding any other provision of law, . . . (B) any civil action, suit, or proceeding to which [FSLIC] shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) [FSLIC] may, without bond or security, remove any such action,

> suit, or proceeding from a State court to the United States district court . . . : *Provided*, That any action, suit, or proceeding to which [FSLIC] is a party in its capacity as conservator, *receiver*, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, *creditors*, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States." FISA, 80 Stat. 1042, 12 U. S. C. § 1730(k)(1) (emphasis added).

The proviso clause sets out the types of suits Congress expected FSLIC to defend against in state courts, including suits by creditors against FSLIC as receiver for state-chartered savings and loan associations. Moreover, there is no indication that Congress intended to treat state-chartered and federally chartered associations differently in this respect. See, *e. g.*, 12 U. S. C. § 1729(c)(1)(A) (granting FSLIC the "same powers and duties" as receiver for defaulted state institutions as it has with respect to federal savings and loan associations). In sum, we conclude that Congress clearly envisaged that the courts would have subject matter jurisdiction over creditor suits against FSLIC.

Because we conclude that FSLIC has not been granted adjudicatory authority by Congress and that Coit is entitled to *de novo* consideration of its state law claims in court, we need not reach Coit's claim that adjudication by FSLIC subject only to judicial review under the Administrative Procedure Act would violate Article III of the Constitution under *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50 (1982). Similarly, we need not reach Coit's due process and Seventh Amendment challenges to adjudication by FSLIC of its state law claims. We note, however, that the usury and breach of fiduciary duty claims raised by Coit, like the contract disputes in *Morrison-Knudsen Co.*, 811 F. 2d, at 1221, involve "private rights" which are at the

"core" of "matters normally reserved to Article III courts." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 853 (1986); *Northern Pipeline*, *supra*, at 69–72. The court below adopted an interpretation of the statutes governing FSLIC and the Bank Board that raises serious constitutional difficulties. In our view, those statutes can and should be read to avoid these difficulties. *Schor*, *supra*, at 841; *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932).

IV

Although FSLIC argued below that the District Court lacked subject matter jurisdiction over Coit's state law claims, respondent now defends the Fifth Circuit's judgment on the narrower ground that "the Bank Board and FSLIC plainly do have power to require claimants first to present their claims to FSLIC, and exhaust the administrative process leading to allowance, settlement, or disallowance" before suing on the claims in court. Brief for Respondent 20, and n. 13. Coit does not challenge the Bank Board's authority to establish a *voluntary* claims procedure. Coit contends, however, that the statutory provisions relied on by FSLIC do not demonstrate a congressional intent to require exhaustion of administrative remedies by claimants before they can file suit in court. Reply Brief for Petitioner 3.

A

Our past cases have recognized that exhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute. *Weinberger* v. *Salfi*, 422 U. S. 749, 766 (1975); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51 (1938). Where a statutory requirement of exhaustion is not explicit, "courts are guided by congressional intent in determining whether application of the doctrine would be consistent with the statutory scheme." *Patsy* v. *Florida Board of Regents*, 457 U. S. 496, 502, n. 4

(1982). Moreover, "a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent." *Id.*, at 501–502.

Congress gave the Bank Board a broad statutory mandate to reorganize or liquidate an insolvent federal savings and loan, using FSLIC as receiver for that purpose. 12 U. S. C. § 1464(d)(6). As we have discussed above, Congress also expressly granted FSLIC as receiver the responsibility to "pay all valid credit obligations of the association," § 1729(b)(1)(B), to "liquidate its assets in an orderly manner," § 1729(b)(1)(A)(v), and to "settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith," § 1729(d). Moreover, Congress gave the Bank Board the broad "power to make rules and regulations for the reorganization, consolidation, liquidation, and dissolution of associations, . . . and for the conduct of conservatorships and receiverships." § 1464(d)(11).

Over 45 years ago, the Bank Board concluded that an administrative claims procedure was necessary in order for FSLIC to carry out its statutory responsibility to pay valid claims and to settle or disallow claims while liquidating the assets of a failed savings and loan association in an orderly manner. Thus, in 1941, acting pursuant to its broad rulemaking authority under § 5(d) of the HOLA, the Bank Board established a claims procedure that remained in effect, largely unaltered, until 1986, when FSLIC's post-*Hudspeth* interim procedures became operative. 6 Fed. Reg. 4413, 4415 (1941).

At the time of the *Hudspeth* decision, the Bank Board's regulations provided that once FSLIC became receiver it would publish a notice to the association's creditors to present their claims by a specified date. 12 CFR § 549.4(a) (1988). Claims filed after that date would be "disallowed, except as the Board may approve them for whole or part payment from the association's assets remaining undistributed

at the time of approval." *Ibid.* The regulations further provided that FSLIC "shall allow any claim seasonably received and proved to its satisfaction," § 549.4(b), and that FSLIC "may wholly or partly disallow any creditor claim . . . not so proved, and shall notify the claimant of the disallowance and the reason therefor," *ibid.* After the date for presenting claims to FSLIC had expired, the regulations required FSLIC to file with the Bank Board "a complete list of claims presented, indicating the character of each claim and whether allowed by the receiver." § 549.4(c). Creditor claims allowed by FSLIC or approved by the Bank Board would then be "paid by the receiver, from time to time, to the extent funds are available, in such manner and amounts as the Board may direct." § 549.5(d).

Following the *Hudspeth* decision, the Bank Board established a dramatically different and more elaborate set of "interim procedures" governing creditor claims. These interim procedures have been used by FSLIC since July 1, 1986. 53 Fed. Reg. 13105 (1988).[2] Under these procedures, FSLIC as receiver first notifies all potential claimants of their right to present a claim by a specified date, which is not less than 90 days from the date of the notice. *Id.*, at 43854 (to be codified at § 575.4). Properly filed claims are then assigned to an agent of FSLIC's Special Representative for an initial determination whether to allow or disallow the claim. *Id.*, at 43854–43855 (to be codified at §§ 575.9(d), 575.10). The Special Representative must notify each claimant within six months after receipt of a properly filed proof of claim (or six months after the end of the 90-day notice period, whichever is

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[2] These procedures were in effect at the time Coit's suit was dismissed for lack of subject matter jurisdiction, and Coit filed its proof of claim pursuant to these procedures by the date specified by FSLIC for claims against the assets of FirstSouth. The interim procedures, with minor modifications, became final on October 31, 1988, 53 Fed. Reg. 43850 (to be codified at 12 CFR pts. 575, 576, 577), and the citations hereafter are to the final version.

later) whether the claim will be allowed in full or in part, disallowed, or retained for further review. *Id.*, at 43855 (to be codified at § 575.11). If the claim is retained by FSLIC for further review, there is no time limit set for its disposition.

In reviewing a claim, the agent may require the claimant to submit additional documentation, answer written questions, provide a sworn statement, and submit a memorandum addressing legal issues. *Ibid.* (to be codified at § 575.13). The Special Representative compiles a "Receiver's record" and ultimately prepares a "proposed determination of claim in the form of proposed findings of fact and conclusions of law." *Id.*, at 43856 (to be codified at § 575.13(l)). If the claimant does not object to a proposed finding of fact or conclusion of law in a request for reconsideration, those facts or conclusions will be "conclusively established against the Claimant." *Ibid.* (to be codified at § 575.13(o)(2)). After considering the Receiver's record, FSLIC then issues a decision on the claim in the form of findings of fact and conclusions of law. *Ibid.* (to be codified at § 575.13(o)(6)).

If a claim is ultimately disallowed by FSLIC in whole or in part, the Special Representative notifies the claimant of its right to Bank Board review of the determination. *Ibid.* (to be codified at §§ 575.13(n), 575.13(p)). Claimants then have 60 days to file a written request for Bank Board review. *Id.*, at 43857 (to be codified at § 576.3(a)). The Bank Board conducts a preliminary review to determine if more information is needed, which will be completed in most cases within 60 days. *Id.*, at 43858 (to be codified at § 576.4(b)). Generally the Bank Board will issue a decision within six months from the date the record is closed. *Ibid.* (to be codified at § 576.7). Thus, even assuming that FSLIC itself rules within 180 days, the entire process for a claimant whose claim is not allowed in full could take well over a year from the time the claim is first filed with FSLIC until the Bank Board completes its final review. Because the regulations put no time limit on FSLIC's

consideration of claims retained for "further review," the length of time could be far longer and even indefinite.

Under these procedures, the Bank Board may make its own findings of fact and conclusions of law based upon the Administrative Record. *Ibid.* (to be codified at § 576.5(e)). The procedures further provide that "[j]udicial review of the disallowance in whole or in part of a claim against the assets of the FSLIC as receiver is available only after exhaustion of these procedures and review and final agency action by the Board." *Id.*, at 43852 (to be codified at § 575.1(a)).

B

Respondent argues that just as the Bank Board has the authority under § 5(d)(11) of HOLA to establish an administrative claims procedure, it also has the authority to require claimants to exhaust that procedure before going to court. Respondent contends that FSLIC will be unable to fulfill its statutory responsibility to liquidate failed savings and loan associations "in an orderly manner" or to make rational judgments about which claims to pay, settle, or contest, unless it has an initial opportunity to consider the entire array of claims against an insolvent estate in a centralized claims process before claimants proceed to court. Brief for Respondent 25–30.

Although the language of the statutes governing FSLIC and the Bank Board does not explicitly mandate exhaustion of administrative remedies as a precondition for filing suit, the NHA does require that FSLIC liquidate the assets of a failed savings and loan "in an orderly manner," 12 U. S. C. § 1729(b)(1)(A)(v), "pay all valid credit obligations," § 1729(b)(1)(B), and "settle, compromise, or release claims in favor of or against the insured institutio[n], and to do all other things that may be necessary in connection therewith," § 1729(d). Moreover, there can be no doubt that the Bank Board's broad authority under § 5(d)(11) of the HOLA to establish rules for the conduct of receiverships empowers

the Board to respond to changing circumstances and present needs, within statutory constraints. § 1464(d)(11). In the present savings and loan crisis, with hundreds of savings and loan associations in receivership,[3] and with creditors of far greater number and variety than the small depositors who once were a failed thrift's main creditors, the Bank Board could reasonably conclude that FSLIC could not possibly fulfill its statutory responsibility to liquidate "in an orderly manner" unless FSLIC had notice of all claims against an insolvent savings and loan association and an initial opportunity to consider them in a centralized claims process.

If the Bank Board's regulations only required claimants to give FSLIC notice of their claims and then to wait for a reasonable period of time before filing suit while FSLIC decided whether to pay, settle, or disallow the claim, we have no doubt that such regulations would be a reasonable exercise of the Bank Board's broad rulemaking power under § 5(d)(11) of the HOLA and would be entirely consistent with Congress' clear intent that FSLIC liquidate failed savings and loan associations "in an orderly manner." The traditional reasons for judicial application of the exhaustion doctrine, even "in cases where the statutory requirement of exclusivity is not so explicit," *McKart* v. *United States*, 395 U. S. 185, 193 (1969), support the conclusion that the Bank Board could require that FSLIC be given notice of creditors' claims and a reasonable period of time to decide, in the first instance, whether to pay, settle, or contest those claims in court. The Bank Board reasonably could decide that FSLIC simply cannot perform its statutory function as receiver and liquidator of failed savings and loan associations unless it is notified of the entire array of claims against the assets of a failed association and has a reasonable period of time to make rational and consistent judgments regarding which claims to allow or contest, based on its expertise and knowledge of the total situation.

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[3] See Note, 10 W. New Eng. L. Rev. 227, 228, n. 2 (1988).

Only then could FSLIC liquidate the association's assets "in an orderly manner," and settle many claims without resort to costly litigation—the expense of which is ultimately borne by the common pool of assets out of which all valid claims are paid.

In cases where suit has already been filed against a savings and loan association before FSLIC is appointed receiver, FSLIC will receive notice of those claims when it steps into the shoes of the failed savings and loan and takes control of its assets. Trial courts can then determine, in their discretion, whether to stay the proceedings for a limited time, based on such factors as the stage of the litigation and FSLIC's need to assess the possibility of settling the claims. See *Landis* v. *North American Co.*, 299 U. S. 248, 254–255 (1936); *Leyva* v. *Certified Grocers of California, Ltd.*, 593 F. 2d 857, 863–864 (CA9 1979); *Marshall* v. *Hartford Fire Ins. Co.*, 78 F. R. D. 97, 107 (Conn. 1978).

In our view, it is incorrect to characterize our exhaustion analysis in this Part as a ruling that the enabling legislation of FSLIC and the Bank Board "pre-empts" state law. See *post*, at 588–589 (SCALIA, J., concurring in part and concurring in judgment). Our discussion in Part IV does not purport to be predicated on any finding that federal law occupies the field to the exclusion of a substantive body of state law or regulations, or that the enforcement of state law would conflict with federal substantive policies. Indeed, we hold explicitly in Part III that Coit is entitled to *de novo* consideration of its state law claims in court, and that FSLIC has no statutory authority to divest the courts of subject matter jurisdiction over those claims. See *supra*, at 578–579. Moreover, the minimal delay entailed in a notice and reasonable time requirement is unlikely to "extinguish" state causes of action in the usual case. On the facts before us today, we need not address a case such as that posited by JUSTICE SCALIA, in which a state statute of limitations may expire during a reasonable waiting period established by FSLIC.

C

The Bank Board's present regulations, however, exceed its statutory authority in two respects. First, the regulations purport to confer adjudicatory authority on FSLIC and on the Bank Board to make binding findings of fact and conclusions of law, subject only to "judicial review" presumably under the Administrative Procedure Act as opposed to *de novo* judicial determination. See, *e. g.*, 53 Fed. Reg. 43852, 43856, 43858 (1988) (to be codified at 12 CFR §§ 575.1, 575.13(o)(6), 576.5(e)). FSLIC does not have such authority for the reasons discussed above in Part III.

Second, the regulations do not place a clear and reasonable time limit on FSLIC's consideration of whether to pay, settle, or disallow claims. Under the current regulations, FSLIC must allow, disallow, or retain a claim "for further review" within six months after the filing of the claim or after the end of the 90-day notice period, 53 Fed. Reg. 43855 (1988), but no time limit is established for FSLIC's consideration of those claims retained for further review. Thus, as Coit so aptly puts it: "These procedures give FSLIC virtually unlimited discretion to bury large claims like Coit's in the administrative process, and to stay judicial proceedings for an unconscionably long period of time given FSLIC's purportedly limited objectives of centralizing the claims process and deciding whether claims should be paid or not." Reply Brief for Petitioner 18.

Indeed, Coit first filed its claim for approximately $113 million with FSLIC on September 28, 1987. Six months later, on March 18, 1988, Coit was notified that its claim was being retained for "further review." As of the date of oral argument, Coit's claim had been pending before FSLIC for over 13 months, and FSLIC had yet to make its initial determination. Since the Bank Board itself can take six months to dispose of any appeal, Coit's claim has essentially been relegated to a "black hole" from which it may not emerge before the statute of limitations on Coit's state law claims has run.

Administrative remedies that are inadequate need not be exhausted. *Greene* v. *United States*, 376 U. S. 149, 163 (1964); *Smith* v. *Illinois Bell Telephone Co.*, 270 U. S. 587, 591–592 (1926) ("[P]ublic service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief"). The lack of a reasonable time limit in the current administrative claims procedure renders it inadequate for several reasons. First, it allows FSLIC to delay the administrative processing of claims indefinitely, denying a litigant its day in court, while the statute of limitations runs. Second, it may enable FSLIC to coerce claimants to enter into unfair settlements by virtue of the fact that the receiver's assets may be depleted by interim distributions to other claimants by the time a claimant finally has access to the courts. These concerns are only exacerbated by the fact that FSLIC itself is often the main creditor against the assets of a failed savings and loan association, and thus may well have an incentive to delay decision on large claims against an insolvent's assets such as the claim filed by Coit.

Because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures. Coit is thus entitled to proceed directly to court for a *de novo* determination on the merits of its state law claims.

In sum, we conclude that Congress has not granted FSLIC the power to adjudicate creditors' claims against the assets of a failed savings and loan association under FSLIC receivership, and that creditors are entitled to *de novo* consideration of their claims in court. Moreover, creditors are not required to exhaust the current administrative claims procedure established by the Bank Board because it places no reasonable time limit on FSLIC's consideration of creditor claims. Accordingly, the judgment below is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I join Parts I, II, and III of the Court's opinion. I refrain from joining Part IV and thus concur only in the judgment. My concern with Part IV is that it seems to me to amount to only an advisory opinion on what the Bank Board may do, based on a surmise of what the Bank Board might someday conclude it *must* do in order to liquidate "in an orderly manner."

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I agree with the judgment of the Court, and join Parts I through III of its opinion. I do not join Part IV, however, because there is no precedent and in my view no sound policy justification for (1) using the doctrine of exhaustion of administrative remedies as a basis for pre-empting state law, and (2) imposing upon the Bank Board the obligation to set forth by rule a specific time period within which FSLIC must act upon claims.

I

This case is not about exhaustion; it is about pre-emption. To my knowledge, the doctrine of exhaustion of administrative remedies has never been used, as it is in today's opinion, as a means of pre-empting state law. We normally apply the doctrine by refusing to entertain a federal claim unless and until the plaintiff has resorted to the federally created administrative remedies for the grievance underlying that claim. See, *e. g.*, *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 20–26 (1974); *McGee* v. *United States*, 402 U. S. 479, 483–486 (1971). That is a fair assessment of the congressional intent in creating the administrative remedies.

In the present case, by contrast, the Court applies what purports to be the exhaustion doctrine, not to determine when Congress wished federal claims to be first assertible, but to determine when Congress wished to prohibit the as-

sertion of *state* claims. The claims at issue in this case—and, I expect, in most litigation involving insolvent thrifts—arise under state law; and the suit was originally brought, before removal, in a Texas court. Part IV of the Court's opinion says that the Bank Board can exclude these Texas-law claims from federal court until they have first been acted upon by FSLIC, or until a specific time limit for such action has passed. Moreover, unless that statement is devoid of practical effect (requiring no more than the remand of removed cases to the state courts), presumably the Court means that the Board can exclude these "unexhausted" claims from state courts as well.

What is enough to suggest a congressional intent to defer the maturing of a federal cause of action is not enough to suggest a congressional intent to override state law. We have repeatedly said that federal law pre-empts state law in traditional fields of state regulation only when "that was the clear and manifest purpose of Congress," *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947); see also *Puerto Rico Dept. of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U. S. 495, 500 (1988); *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 715 (1985); *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). These assurances are meaningless if the directions to FSLIC to "pay all valid credit obligations," 12 U. S. C. § 1729(b)(1)(B), to "liquidate . . . assets in an orderly manner," 12 U. S. C. § 1729(b)(1)(A)(v), and to "settle, compromise, or release claims . . . and to do all other things that may be necessary in connection therewith," 12 U. S. C. § 1729(d), can be interpreted as a congressional authorization for the suspension of rights arising under state usury and contract law, and for the exclusion of state-court jurisdiction.

II

It is, however, an understatement to say that what is involved is merely a "suspension" of state-created rights. The

suspension becomes an extinguishment if, during the period while the plaintiff is pursuing his required "exhaustion" of federal remedies for his state claim, the state statute of limitations expires. To meet this difficulty, and thereby to make its pre-emption of state law seem less drastic, the Court imposes upon the Bank Board the requirement that its regulations "place a clear and reasonable time limit on FSLIC's consideration of whether to pay, settle, or disallow claims." *Ante*, at 586. Of course even this does not completely solve the problem. Even if the Bank Board establishes a flat 90-day limit, those state-created claims whose statute of limitations happens to expire during that 90-day period will be extinguished. The only complete solution would be to require tolling of the state statutes of limitations during this 90-day period—but that is so much more obviously a pre-emption of state law, and so difficult to conceal under the guise of "exhaustion," that the Court avoids it, leaving state claimants without remedy if their causes of action expire before federal "exhaustion" has occurred.

But to achieve this limited benefit, the Court creates yet another novel doctrine that we may have cause to regret. I know of no precedent for the proposition that an agency's regulations are "arbitrary, capricious" or "otherwise not in accordance with law," 5 U. S. C. § 706(2)(A), simply because they do not set forth a precise time by which the agency will have acted. To be sure, particular agency action *becomes* arbitrary and capricious when it is too long delayed, wherefore the Administrative Procedure Act instructs reviewing courts to "compel agency action unlawfully withheld *or unreasonably delayed*," 5 U. S. C. § 706(1) (emphasis added). But that determination is made on a case-by-case basis. See, *e. g.*, *Sierra Club* v. *Thomas*, 264 U. S. App. D. C. 203, 212–215, 828 F. 2d 783, 794–797 (1987); *Public Citizen Health Research Group* v. *Commissioner, Food and Drug Administration*, 238 U. S. App. D. C. 271, 285, 740 F. 2d 21, 35 (1984). The equivalent, in the present context, would be

to say that exhaustion has been completed when, in the particular case, FSLIC has taken too long to make up its mind. See, *e. g.*, *id.*, at 282, 740 F. 2d, at 32; *Environmental Defense Fund, Inc.* v. *Hardin*, 138 U. S. App. D. C. 391, 397, 428 F. 2d 1093, 1099–1100 (1970). But to say that the Bank Board must establish, for all cases, a specified cut-off date is to impose, contrary to our case law, a requirement that appears neither in the Administrative Procedure Act nor in FSLIC's organic law. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 524 (1978). The only thing to be said for the invention is that it somewhat reduces the harm caused by invention of the "exhaustion" requirement. One distortion has led to another.

* * *

It seems to me that, in Part IV of its opinion, the Court labors courageously—but in the last analysis unsuccessfully—to supply what is lacking in FSLIC's organic law to cover the extraordinary situation with which the agency is now confronted. Ordinarily, the filing of a lawsuit against an insolvent thrift would pose no major problem. Service of summons in the suit would itself constitute notice of the claim, and if FSLIC was interested in granting or settling the claim it could request the state or federal court to defer further proceedings for a reasonable time pending settlement negotiations. It is hard to imagine that any court would deny such a request. It is only the current enormous volume of claims against insolvent thrifts, in a diversity of courts, that makes it impracticable for FSLIC to proceed in this fashion. I do not think it our role to supply the emergency provisions Congress has not enacted—and we are not much good at it anyway, since I doubt that (even at the expense of making some bad law) we have succeeded in giving FSLIC meaningful relief. The agency's main problem, I suspect, is that the number of claims it must review is so high that it cannot give courts assurances that it will be able to address

settlement within a "reasonable time." Today's opinion does nothing to solve that. Congress is currently considering legislation directed towards the so-called "Savings and Loan crisis," Financial Institutions Reform, Recovery and Enforcement Act of 1989, S. 413, 101st Cong., 1st Sess. (1989), and instead of the dicta in Part IV of the opinion, we should have remanded FSLIC to that legislative process.

For these reasons, although I join in the reversal of the decision below, I do so on the more categorical ground that FSLIC's claim procedures cannot pre-empt the filing of suits under state law.

Syllabus

BROWER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF CALDWELL (BROWER), ET AL. *v.* COUNTY OF INYO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87–248. Argued January 11, 1989—Decided March 21, 1989

Petitioners' decedent (Brower) was killed when the stolen car he had been driving at high speeds to elude pursuing police crashed into a police roadblock. Petitioners brought suit under 42 U. S. C. § 1983 in Federal District Court, claiming, *inter alia*, that respondents, acting under color of law, violated Brower's Fourth Amendment rights by effecting an unreasonable seizure using excessive force. Specifically, the complaint alleges that respondents placed an 18-wheel truck completely across the highway in the path of Brower's flight, behind a curve, with a police cruiser's headlights aimed in such fashion as to blind Brower on his approach. It also alleges that the fatal collision was a "proximate result" of this police conduct. The District Court dismissed for failure to state a claim, concluding that the roadblock was not unreasonable under the circumstances, and the Court of Appeals affirmed on the ground that no "seizure" had occurred.

Held:

1. Consistent with the language, history, and judicial construction of the Fourth Amendment, a seizure occurs when governmental termination of a person's movement is effected through means intentionally applied. Because the complaint alleges that Brower was stopped by the instrumentality set in motion or put in place to stop him, it states a claim of Fourth Amendment "seizure." Pp. 595–599.

2. Petitioners can claim the right to recover for Brower's death because the unreasonableness alleged consists precisely of setting up the roadblock in such a manner as to be likely to kill him. On remand, the Court of Appeals must determine whether the District Court erred in concluding that the roadblock was not "unreasonable." Pp. 599–600.

817 F. 2d 540, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 600.

Robert G. Gilmore argued the cause for petitioners. With him on the briefs was *Craig A. Diamond.*

Philip W. McDowell argued the cause for respondents. With him on the brief was *Gregory L. James.*

JUSTICE SCALIA delivered the opinion of the Court.

On the night of October 23, 1984, William James Caldwell (Brower) was killed when the stolen car that he had been driving at high speeds for approximately 20 miles in an effort to elude pursuing police crashed into a police roadblock. His heirs, petitioners here, brought this action in Federal District Court under 42 U. S. C. § 1983, claiming, *inter alia*, that respondents used "brutal, excessive, unreasonable and unnecessary physical force" in establishing the roadblock, and thus effected an unreasonable seizure of Brower, in violation of the Fourth Amendment. Petitioners alleged that "under color of statutes, regulations, customs and usages," respondents (1) caused an 18-wheel tractor-trailer to be placed across both lanes of a two-lane highway in the path of Brower's flight, (2) "effectively concealed" this roadblock by placing it behind a curve and leaving it unilluminated, and (3) positioned a police car, with its headlights on, between Brower's oncoming vehicle and the truck, so that Brower would be "blinded" on his approach. App. 8–9. Petitioners further alleged that Brower's fatal collision with the truck was "a proximate result" of this official conduct. *Id.*, at 9. The District Court granted respondents' motion to dismiss the complaint for failure to state a claim on the ground (insofar as the Fourth Amendment claim was concerned) that "establishing a roadblock [was] not unreasonable under the circumstances." App. to Pet. for Cert. A–21. A divided panel of the Court of Appeals for the Ninth Circuit affirmed the dismissal of the Fourth Amendment claim on the basis that no "seizure" had occurred. 817 F. 2d 540, 545–546 (1987). We granted certiorari, 487 U. S. 1217 (1988), to resolve a conflict between that decision and the contrary hold-

ing of the Court of Appeals for the Fifth Circuit in *Jamieson* v. *Shaw*, 772 F. 2d 1205 (1985).

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

In *Tennessee* v. *Garner*, 471 U. S. 1 (1985), all Members of the Court agreed that a police officer's fatal shooting of a fleeing suspect constituted a Fourth Amendment "seizure." See *id.*, at 7; *id.*, at 25 (O'CONNOR, J., dissenting). We reasoned that "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person." *Id.*, at 7. While acknowledging *Garner*, the Court of Appeals here concluded that no "seizure" occurred when Brower collided with the police roadblock because "[p]rior to his failure to stop voluntarily, his freedom of movement was never arrested or restrained" and because "[h]e had a number of opportunities to stop his automobile prior to the impact." 817 F. 2d, at 546. Essentially the same thing, however, could have been said in *Garner*. Brower's independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet.

The Court of Appeals was impelled to its result by consideration of what it described as the "analogous situation" of a police chase in which the suspect unexpectedly loses control of his car and crashes. See *Galas* v. *McKee*, 801 F. 2d 200, 202–203 (CA6 1986) (no seizure in such circumstances). We agree that no unconstitutional seizure occurs there, but not for a reason that has any application to the present case.

Violation of the Fourth Amendment requires an intentional acquisition of physical control. A seizure occurs even when an unintended person or thing is the object of the detention or taking, see *Hill* v. *California*, 401 U. S. 797, 802–805 (1971); cf. *Maryland* v. *Garrison*, 480 U. S. 79, 85–89 (1987), but the detention or taking itself must be willful. This is implicit in the word "seizure," which can hardly be applied to an unknowing act. The writs of assistance that were the principal grievance against which the Fourth Amendment was directed, see *Boyd* v. *United States*, 116 U. S. 616, 624–625 (1886); T. Cooley, Constitutional Limitations *301–*302, did not involve unintended consequences of government action. Nor did the general warrants issued by Lord Halifax in the 1760's, which produced "the first and only major litigation in the English courts in the field of search and seizure," T. Taylor, Two Studies in Constitutional Interpretation 26 (1969), including the case we have described as a "monument of English freedom" "undoubtedly familiar" to "every American statesman" at the time the Constitution was adopted, and considered to be "the true and ultimate expression of constitutional law," *Boyd*, *supra*, at 626 (discussing *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K. B. 1765)). In sum, the Fourth Amendment addresses "misuse of power," *Byars* v. *United States*, 273 U. S. 28, 33 (1927), not the accidental effects of otherwise lawful government conduct.

Thus, if a parked and unoccupied police car slips its brake and pins a passerby against a wall, it is likely that a tort has occurred, but not a violation of the Fourth Amendment. And the situation would not change if the passerby happened, by lucky chance, to be a serial murderer for whom there was an outstanding arrest warrant—even if, at the time he was thus pinned, he was in the process of running away from two pursuing constables. It is clear, in other words, that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an

individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied.* That is the reason there was no seizure in the hypothetical situation that concerned the Court of Appeals. The pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit; and though he was in fact stopped, he was stopped by a different means—his loss of control of his vehicle and the subsequent crash. If, instead of that, the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure.

This analysis is reflected by our decision in *Hester* v. *United States*, 265 U. S. 57 (1924), where an armed revenue agent had pursued the defendant and his accomplice after seeing them obtain containers thought to be filled with "moonshine whisky." During their flight they dropped the containers, which the agent recovered. The defendant sought to suppress testimony concerning the containers' contents as the product of an unlawful seizure. Justice Holmes, speaking for a unanimous Court, concluded: "The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after they had been abandoned." *Id.*, at 58. Thus, even though the incriminating containers were unquestionably taken into possession as a result (in the broad sense) of action by the police, the Court held that no seizure had taken place. It would have been quite different, of course, if the revenue agent had shouted, "Stop and give us those bottles, in the name of the law!" and the defendant and his accomplice had complied. Then the taking of possession would have been

not merely the result of government action but the result of the very means (the show of authority) that the government selected, and a Fourth Amendment seizure would have occurred.

In applying these principles to the dismissal of petitioners' Fourth Amendment complaint for failure to state a claim, we can sustain the District Court's action only if, taking the allegations of the complaint in the light most favorable to petitioners, see *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974), we nonetheless conclude that they could prove no set of facts entitling them to relief for a "seizure." See *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957). Petitioners have alleged the establishment of a roadblock crossing both lanes of the highway. In marked contrast to a police car pursuing with flashing lights, or to a policeman in the road signaling an oncoming car to halt, see *Kibbe* v. *Springfield*, 777 F. 2d 801, 802–803 (CA1 1985), cert. dism'd, 480 U. S. 257 (1987), a roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur. It may well be that respondents here preferred, and indeed earnestly hoped, that Brower would stop on his own, without striking the barrier, but we do not think it practicable to conduct such an inquiry into subjective intent. See *United States* v. *Leon*, 468 U. S. 897, 922, n. 23 (1984); see also *Anderson* v. *Creighton*, 483 U. S. 635, 641 (1987); *Harlow* v. *Fitzgerald*, 457 U. S. 800, 815–819 (1982). Nor do we think it possible, in determining whether there has been a seizure in a case such as this, to distinguish between a roadblock that is designed to give the oncoming driver the option of a voluntary stop (*e. g.*, one at the end of a long straightaway), and a roadblock that is designed precisely to produce a collision (*e. g.*, one located just around a bend). In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been

stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped.

This is not to say that the precise character of the roadblock is irrelevant to further issues in this case. "Seizure" alone is not enough for § 1983 liability; the seizure must be "unreasonable." Petitioners can claim the right to recover for Brower's death only because the unreasonableness they allege consists precisely of setting up the roadblock in such manner as to be likely to kill him. This should be contrasted with the situation that would obtain if the sole claim of unreasonableness were that there was no probable cause for the stop. In that case, if Brower had had the opportunity to stop voluntarily at the roadblock, but had negligently or intentionally driven into it, then, because of lack of proximate causality, respondents, though responsible for depriving him of his freedom of movement, would not be liable for his death. See *Martinez* v. *California*, 444 U. S. 277, 285 (1980); *Cameron* v. *Pontiac*, 813 F. 2d 782, 786 (CA6 1987). Thus, the circumstances of this roadblock, including the allegation that headlights were used to blind the oncoming driver, may yet determine the outcome of this case.

The complaint here sufficiently alleges that respondents, under color of law, sought to stop Brower by means of a roadblock and succeeded in doing so. That is enough to constitute a "seizure" within the meaning of the Fourth Amendment. Accordingly, we reverse the judgment of the Court of Appeals and remand for consideration of whether the District Court properly dismissed the Fourth Amendment claim

on the basis that the alleged roadblock did not effect a seizure that was "unreasonable."

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in the judgment.

The Court is unquestionably correct in concluding that respondents' use of a roadblock to stop Brower's car constituted a seizure within the meaning of the Fourth Amendment. I therefore concur in its judgment. I do not, however, join its opinion because its dicta seem designed to decide a number of cases not before the Court and to establish the proposition that "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control." *Ante*, at 596.

The intentional acquisition of physical control of something is no doubt a characteristic of the typical seizure, but I am not entirely sure that it is an essential element of every seizure or that this formulation is particularly helpful in deciding close cases. The Court suggests that the test it articulates does not turn on the subjective intent of the officer. *Ante*, at 598. This, of course, not only comports with the recent trend in our cases, see, *e. g.*, *Harlow* v. *Fitzgerald*, 457 U. S. 800, 815–819 (1982); *United States* v. *Mendenhall*, 446 U. S. 544, 554, n. 6 (1980) (opinion of Stewart, J.), but also makes perfect sense. No one would suggest that the Fourth Amendment provides no protection against a police officer who is too drunk to act intentionally, yet who appears in uniform brandishing a weapon in a threatening manner. Alternatively, however, the concept of objective intent, at least in the vast majority of cases, adds little to the well-established rule that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.*, at 554

(opinion of Stewart, J.); see also *INS* v. *Delgado*, 466 U. S. 210, 215 (1984).

There may be a case that someday comes before this Court in which the concept of intent is useful in applying the Fourth Amendment. What is extraordinary about the Court's discussion of the intent requirement in this case is that there is no dispute that the roadblock was intended to stop the decedent. Decision in the case before us is thus not advanced by pursuing a hypothetical inquiry concerning whether an unintentional act might also violate the Fourth Amendment. Rather, as explained in Judge Pregerson's dissent in the Court of Appeals, this case is plainly controlled by our decision in *Tennessee* v. *Garner*, 471 U. S. 1 (1985). 817 F. 2d 540, 548 (CA9 1987) (opinion concurring in part and dissenting in part). In that case, we held that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." 471 U. S., at 7. Because it was undisputed that the police officer acted intentionally, we did not discuss the hypothetical case of an unintentional seizure. I would exercise the same restraint here.

I am in full accord with Judge Pregerson's dissenting opinion, and, for the reasons stated in his opinion, I join the Court's judgment.

SKINNER, SECRETARY OF TRANSPORTATION, ET AL. *v.* RAILWAY LABOR EXECUTIVES' ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87–1555. Argued November 2, 1988—Decided March 21, 1989

Upon the basis of evidence indicating that alcohol and drug abuse by railroad employees had caused or contributed to a number of significant train accidents, the Federal Railroad Administration (FRA) promulgated regulations under petitioner Secretary of Transportation's statutory authority to adopt safety standards for the industry. Among other things, Subpart C of the regulations requires railroads to see that blood and urine tests of covered employees are conducted following certain major train accidents or incidents, while Subpart D authorizes, but does not require, railroads to administer breath or urine tests or both to covered employees who violate certain safety rules. Respondents, the Railway Labor Executives' Association and various of its member labor organizations, brought suit in the Federal District Court to enjoin the regulations. The court granted summary judgment for petitioners, concluding that the regulations did not violate the Fourth Amendment. The Court of Appeals reversed, ruling, *inter alia*, that a requirement of particularized suspicion is essential to a finding that toxicological testing of railroad employees is reasonable under the Fourth Amendment. The court stated that such a requirement would ensure that the tests, which reveal the presence of drug metabolites that may remain in the body for weeks following ingestion, are confined to the detection of current impairment.

Held:

1. The Fourth Amendment is applicable to the drug and alcohol testing mandated or authorized by the FRA regulations. Pp. 613–618.

(a) The tests in question cannot be viewed as private action outside the reach of the Fourth Amendment. A railroad that complies with Subpart C does so by compulsion of sovereign authority and therefore must be viewed as an instrument or agent of the Government. Similarly, even though Subpart D does not compel railroads to test, it cannot be concluded, in the context of this facial challenge, that such testing will be primarily the result of private initiative, since specific features of the regulations combine to establish that the Government has actively encouraged, endorsed, and participated in the testing. Specifically, since

the regulations pre-empt state laws covering the same subject matter and are intended to supersede collective-bargaining and arbitration-award provisions, the Government has removed all legal barriers to the testing authorized by Subpart D. Moreover, by conferring upon the FRA the right to receive biological samples and test results procured by railroads, Subpart D makes plain a strong preference for testing and a governmental desire to share the fruits of such intrusions. In addition, the regulations mandate that railroads not bargain away their Subpart D testing authority and provide that an employee who refuses to submit to such tests must be withdrawn from covered service. Pp. 614–616.

(b) The collection and subsequent analysis of the biological samples required or authorized by the regulations constitute searches of the person subject to the Fourth Amendment. This Court has long recognized that a compelled intrusion into the body for blood to be tested for alcohol content and the ensuing chemical analysis constitute searches. Similarly, subjecting a person to the breath test authorized by Subpart D must be deemed a search, since it requires the production of "deep lung" breath and thereby implicates concerns about bodily integrity. Moreover, although the collection and testing of urine under the regulations do not entail any intrusion into the body, they nevertheless constitute searches, since they intrude upon expectations of privacy as to medical information and the act of urination that society has long recognized as reasonable. Even if the employer's antecedent interference with the employee's freedom of movement cannot be characterized as an independent Fourth Amendment seizure, any limitation on that freedom that is necessary to obtain the samples contemplated by the regulations must be considered in assessing the intrusiveness of the searches affected by the testing program. Pp. 616–618.

2. The drug and alcohol tests mandated or authorized by the FRA regulations are reasonable under the Fourth Amendment even though there is no requirement of a warrant or a reasonable suspicion that any particular employee may be impaired, since, on the present record, the compelling governmental interests served by the regulations outweigh employees' privacy concerns. Pp. 618–633.

(a) The Government's interest in regulating the conduct of railroad employees engaged in safety-sensitive tasks in order to ensure the safety of the traveling public and of the employees themselves plainly justifies prohibiting such employees from using alcohol or drugs while on duty or on call for duty and the exercise of supervision to assure that the restrictions are in fact observed. That interest presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements. Pp. 618–621.

(b) Imposing a warrant requirement in the present context is not essential to render the intrusions at issue reasonable. Such a requirement would do little to further the purposes of a warrant, since both the circumstances justifying toxicological testing and the permissible limits of such intrusions are narrowly and specifically defined by the regulations and doubtless are well known to covered employees, and since there are virtually no facts for a neutral magistrate to evaluate, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program. Moreover, imposing a warrant requirement would significantly hinder, and in many cases frustrate, the objectives of the testing program, since the delay necessary to procure a warrant could result in the destruction of valuable evidence, in that alcohol and drugs are eliminated from the bloodstream at a constant rate, and since the railroad supervisors who set the testing process in motion have little familiarity with the intricacies of Fourth Amendment jurisprudence. Pp. 621–624.

(c) Imposing an individualized suspicion requirement in the present context is not essential to render the intrusions at issue reasonable. The testing procedures contemplated by the regulations pose only limited threats to covered employees' justifiable privacy expectations, particularly since they participate in an industry subject to pervasive safety regulation by the Federal and State Governments. Moreover, because employees ordinarily consent to significant employer-imposed restrictions on their freedom of movement, any additional interference with that freedom that occurs in the time it takes to procure a sample from a railroad employee is minimal. Furthermore, *Schmerber* v. *California*, 384 U. S. 757, established that governmentally imposed blood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity, and the breath tests authorized by Subpart D are even less intrusive than blood tests. And, although urine tests require employees to perform an excretory function traditionally shielded by great privacy, the regulations reduce the intrusiveness of the collection process by requiring that samples be furnished in a medical environment without direct observation. In contrast, the governmental interest in testing without a showing of individualized suspicion is compelling. A substance-impaired railroad employee in a safety-sensitive job can cause great human loss before any signs of the impairment become noticeable, and the regulations supply an effective means of deterring such employees from using drugs or alcohol by putting them on notice that they are likely to be discovered if an accident occurs. An individualized suspicion requirement would also impede railroads' ability to obtain valuable information about the causes of accidents or incidents and how to protect the public, since obtaining evidence giving rise to the suspicion

that a particular employee is impaired is impracticable in the chaotic aftermath of an accident when it is difficult to determine which employees contributed to the occurrence and objective indicia of impairment are absent. The Court of Appeals' conclusion that the regulations are unreasonable because the tests in question cannot measure current impairment is flawed. Even if urine test results disclosed nothing more specific than the recent use of controlled substances, this information would provide the basis for a further investigation and might allow the FRA to reach an informed judgment as to how the particular accident occurred. More importantly, the court overlooked the FRA's policy of placing principal reliance on blood tests, which unquestionably can identify recent drug use, and failed to recognize that the regulations are designed not only to discern impairment but to deter it. Pp. 624–632.

839 F. 2d 575, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined, and in all but portions of Part III of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 634. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 635.

Attorney General Thornburgh argued the cause for petitioners. On the briefs were *Solicitor General Fried, Assistant Attorney General Bolton, Deputy Solicitor General Merrill, Deputy Assistant Attorneys General Spears* and *Cynkar, Lawrence S. Robbins, Leonard Schaitman, Marc Richman, B. Wayne Vance, S. Mark Lindsey*, and *Daniel Carey Smith.*

Lawrence M. Mann argued the cause for respondents. With him on the brief were *W. David Holsberry, Harold A. Ross*, and *Clinton J. Miller III.**

*Briefs of *amici curiae* urging reversal were filed for the American Public Transit Association by *Donald T. Bliss;* for the Bendiner-Schlesinger Laboratory et al. by *David G. Evans* and *William J. Judge;* for the California Employment Law Council by *Victor Schachter;* for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell, Stephen C. Yohay*, and *Garen E. Dodge;* for the National Railroad Passenger Corporation et al. by *Erwin N. Griswold;* for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Anthony T. Caso;* for the Private Truck Council of America, Inc., et al. by *Peter A. Susser, William H.*

JUSTICE KENNEDY delivered the opinion of the Court.

The Federal Railroad Safety Act of 1970 authorizes the Secretary of Transportation to "prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." 84 Stat. 971, 45 U. S. C. § 431(a). Finding that alcohol and drug abuse by railroad employees poses a serious threat to safety, the Federal Railroad Administration (FRA) has promulgated regulations that mandate blood and urine tests of employees who are involved in certain train accidents. The FRA also has adopted regulations that do not require, but do authorize, railroads to administer breath and urine tests to employees who violate certain safety rules. The question presented by this case is whether these regulations violate the Fourth Amendment.

I

A

The problem of alcohol use on American railroads is as old as the industry itself, and efforts to deter it by carrier rules began at least a century ago. For many years, railroads have prohibited operating employees from possessing alcohol or being intoxicated while on duty and from consuming alcoholic beverages while subject to being called for duty. More recently, these proscriptions have been expanded to forbid possession or use of certain drugs. These restrictions are

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Borghesani, Jr., G. William Frick, and *Alan B. Friedlander;* and for Thomas Colley et al. by *John G. Kester, John J. Buckley, Jr., Stephen L. Urbanczyk, William C. Sammons, Stanley J. Glod, Charles I. Appler, Thomas L. Bright, Robert W. Katz, William L. Pope,* and *Bertram D. Fisher.*

Briefs *of amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *James D. Holzhauer, John A. Powell, Stephen R. Shapiro, Harvey Grossman,* and *Edward M. Chen;* and for the American Federation of Labor and Congress of Industrial Organizations by *David Silberman* and *Laurence Gold.*

Scott D. Raphael filed a brief for the Aircraft Owners & Pilots Association as *amicus curiae.*

embodied in "Rule G," an industry-wide operating rule promulgated by the Association of American Railroads, and are enforced, in various formulations, by virtually every railroad in the country. The customary sanction for Rule G violations is dismissal.

In July 1983, the FRA expressed concern that these industry efforts were not adequate to curb alcohol and drug abuse by railroad employees. The FRA pointed to evidence indicating that on-the-job intoxication was a significant problem in the railroad industry.[1] The FRA also found, after a review of accident investigation reports, that from 1972 to 1983 "the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor," and that these accidents "resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million (approximately $27 million in 1982 dollars)." 48 Fed. Reg. 30726 (1983). The FRA further identified "an additional 17 fatalities to operating employees working on or around rail rolling stock that involved alcohol or drugs as a contributing factor." *Ibid.* In light of these problems, the FRA solicited comments from interested parties on a various regulatory approaches to the problems of alcohol and drug abuse throughout the Nation's railroad system.

Comments submitted in response to this request indicated that railroads were able to detect a relatively small number of Rule G violations, owing, primarily, to their practice of

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[1] The FRA noted that a 1979 study examining the scope of alcohol abuse on seven major railroads found that "[a]n estimated one out of every eight railroad workers drank at least once while on duty during the study year." 48 Fed. Reg. 30724 (1983). In addition, "5% of workers reported to work 'very drunk' or got 'very drunk' on duty at least once in the study year," and "13% of workers reported to work at least 'a little drunk' one or more times during that period." *Ibid.* The study also found that 23% of the operating personnel were "problem drinkers," but that only 4% of these employees "were receiving help through an employee assistance program, and even fewer were handled through disciplinary procedures." *Ibid.*

relying on observation by supervisors and co-workers to enforce the rule. 49 Fed. Reg. 24266–24267 (1984). At the same time, "industry participants . . . confirmed that alcohol and drug use [did] occur on the railroads with unacceptable frequency," and available information from all sources "suggest[ed] that the problem includ[ed] 'pockets' of drinking and drug use involving multiple crew members (before and during work), sporadic cases of individuals reporting to work impaired, and repeated drinking and drug use by individual employees who are chemically or psychologically dependent on those substances." *Id.*, at 24253–24254. "Even without the benefit of regular post-accident testing," the FRA "identified 34 fatalities, 66 injuries and over $28 million in property damage (in 1983 dollars) that resulted from the errors of alcohol and drug-impaired employees in 45 train accidents and train incidents during the period 1975 through 1983." *Id.*, at 24254. Some of these accidents resulted in the release of hazardous materials and, in one case, the ensuing pollution required the evacuation of an entire Louisiana community. *Id.*, at 24254, 24259. In view of the obvious safety hazards of drug and alcohol use by railroad employees, the FRA announced in June 1984 its intention to promulgate federal regulations on the subject.

B

After reviewing further comments from representatives of the railroad industry, labor groups, and the general public, the FRA, in 1985, promulgated regulations addressing the problem of alcohol and drugs on the railroads. The final regulations apply to employees assigned to perform service subject to the Hours of Service Act, ch. 2939, 34 Stat. 1415, as amended, 45 U. S. C. § 61 *et seq.* The regulations prohibit covered employees from using or possessing alcohol or any controlled substance. 49 CFR § 219.101(a)(1) (1987). The regulations further prohibit those employees from reporting for covered service while under the influence of, or

impaired by, alcohol, while having a blood alcohol concentration of 0.04 or more, or while under the influence of, or impaired by, any controlled substance. § 219.101(a)(2). The regulations do not restrict, however, a railroad's authority to impose an absolute prohibition on the presence of alcohol or any drug in the body fluids of persons in its employ, § 219.101(c), and, accordingly, they do not "replace Rule G or render it unenforceable." 50 Fed. Reg. 31538 (1985).

To the extent pertinent here, two subparts of the regulations relate to testing. Subpart C, which is entitled "Post-Accident Toxicological Testing," is mandatory. It provides that railroads "shall take all practicable steps to assure that all covered employees of the railroad directly involved . . . provide blood and urine samples for toxicological testing by FRA," § 219.203(a), upon the occurrence of certain specified events. Toxicological testing is required following a "major train accident," which is defined as any train accident that involves (i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of $500,000 or more. § 219.201 (a)(1). The railroad has the further duty of collecting blood and urine samples for testing after an "impact accident," which is defined as a collision that results in a reportable injury, or in damage to railroad property of $50,000 or more. § 219.201(a)(2). Finally, the railroad is also obligated to test after "[a]ny train incident that involves a fatality to any on-duty railroad employee." § 219.201(a)(3).

After occurrence of an event which activates its duty to test, the railroad must transport all crew members and other covered employees directly involved in the accident or incident to an independent medical facility, where both blood and urine samples must be obtained from each employee.[2] After

[2]The regulations provide a limited exception from testing "if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident." 49 CFR § 219.203(a)(3)(i) (1987). No exception may be made,

the samples have been collected, the railroad is required to ship them by prepaid air freight to the FRA laboratory for analysis. § 219.205(d). There, the samples are analyzed using "state-of-the-art equipment and techniques" to detect and measure alcohol and drugs.[3] The FRA proposes to place primary reliance on analysis of blood samples, as blood is "the only available body fluid . . . that can provide a clear indication not only of the presence of alcohol and drugs but also their current impairment effects." 49 Fed. Reg. 24291 (1984). Urine samples are also necessary, however, because drug traces remain in the urine longer than in blood, and in some cases it will not be possible to transport employees to a medical facility before the time it takes for certain drugs to be eliminated from the bloodstream. In those instances, a "positive urine test, taken with specific information on the pattern of elimination for the particular drug and other information on the behavior of the employee and the circumstances of the accident, may be crucial to the determination of" the cause of an accident. *Ibid.*

The regulations require that the FRA notify employees of the results of the tests and afford them an opportunity to respond in writing before preparation of any final investigative report. See § 219.211(a)(2). Employees who refuse to provide required blood or urine samples may not perform cov-

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however, in the case of a "major train accident." *Ibid.* In promulgating the regulations, the FRA noted that, while it is sometimes possible to exonerate crew members in other situations calling for testing, it is especially difficult to assess fault and degrees of fault in the aftermath of the more substantial accidents. See 50 Fed. Reg. 31544 (1985).

[3] See Federal Railroad Administration, United States Dept. of Transportation Field Manual: Control of Alcohol and Drug Use in Railroad Operations B–12 (1986) (Field Manual). Ethyl alcohol is measured by gas chromatography. *Ibid.* In addition, while drug screens may be conducted by immunoassays or other techniques, "[p]ositive drug findings are confirmed by gas chromatography/mass spectrometry." *Ibid.* These tests, if properly conducted, identify the presence of alcohol and drugs in the biological samples tested with great accuracy.

ered service for nine months, but they are entitled to a hearing concerning their refusal to take the test. § 219.213.

Subpart D of the regulations, which is entitled "Authorization to Test for Cause," is permissive. It authorizes railroads to require covered employees to submit to breath or urine tests in certain circumstances not addressed by Subpart C. Breath or urine tests, or both, may be ordered (1) after a reportable accident or incident, where a supervisor has a "reasonable suspicion" that an employee's acts or omissions contributed to the occurrence or severity of the accident or incident, § 219.301(b)(2); or (2) in the event of certain specific rule violations, including noncompliance with a signal and excessive speeding, § 219.301(b)(3). A railroad also may require breath tests where a supervisor has a "reasonable suspicion" that an employee is under the influence of alcohol, based upon specific, personal observations concerning the appearance, behavior, speech, or body odors of the employee. § 219.301(b)(1). Where impairment is suspected, a railroad, in addition, may require urine tests, but only if two supervisors make the appropriate determination, § 219.301(c)(2)(i), and, where the supervisors suspect impairment due to a substance other than alcohol, at least one of those supervisors must have received specialized training in detecting the signs of drug intoxication, § 219.301(c)(2)(ii).

Subpart D further provides that whenever the results of either breath or urine tests are intended for use in a disciplinary proceeding, the employee must be given the opportunity to provide a blood sample for analysis at an independent medical facility. § 219.303(c). If an employee declines to give a blood sample, the railroad may presume impairment, absent persuasive evidence to the contrary, from a positive showing of controlled substance residues in the urine. The railroad must, however, provide detailed notice of this presumption to its employees, and advise them of their right to provide a contemporaneous blood sample. As in the case of samples procured under Subpart C, the regulations set forth

procedures for the collection of samples, and require that samples "be analyzed by a method that is reliable within known tolerances." § 219.307(b).

C

Respondents, the Railway Labor Executives' Association and various of its member labor organizations, brought the instant suit in the United States District Court for the Northern District of California, seeking to enjoin the FRA's regulations on various statutory and constitutional grounds. In a ruling from the bench, the District Court granted summary judgment in petitioners' favor. The court concluded that railroad employees "have a valid interest in the integrity of their own bodies" that deserved protection under the Fourth Amendment. App. to Pet. for Cert. 53a. The court held, however, that this interest was outweighed by the competing "public and governmental interest in the . . . promotion of . . . railway safety, safety for employees, and safety for the general public that is involved with the transportation." *Id.*, at 52a. The District Court found respondents' other constitutional and statutory arguments meritless.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. *Railway Labor Executives' Assn.* v. *Burnley*, 839 F. 2d 575 (1988). The court held, first, that tests mandated by a railroad in reliance on the authority conferred by Subpart D involve sufficient Government action to implicate the Fourth Amendment, and that the breath, blood, and urine tests contemplated by the FRA regulations are Fourth Amendment searches. The court also "agre[ed] that the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant." *Id.*, at 583. The court further held that "accommodation of railroad employees' privacy interest with the significant safety concerns of the government does not require adherence to a probable cause requirement," and, accordingly, that the legality of the searches contemplated by

the FRA regulations depends on their reasonableness under all the circumstances. *Id.*, at 587.

The court concluded, however, that particularized suspicion is essential to a finding that toxicological testing of railroad employees is reasonable. *Ibid.* A requirement of individualized suspicion, the court stated, would impose "no insuperable burden on the government," *id.*, at 588, and would ensure that the tests are confined to the detection of current impairment, rather than to the discovery of "the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug." *Id.*, at 588–589. Except for the provisions authorizing breath and urine tests on a "reasonable suspicion" of drug or alcohol impairment, 49 CFR §§ 219.301(b)(1) and (c)(2) (1987), the FRA regulations did not require a showing of individualized suspicion, and, accordingly, the court invalidated them.

Judge Alarcon dissented. He criticized the majority for "fail[ing] to engage in [a] balancing of interests" and for focusing instead "solely on the degree of impairment of the workers' privacy interests." 839 F. 2d, at 597. The dissent would have held that "the government's compelling need to assure railroad safety by controlling drug use among railway personnel outweighs the need to protect privacy interests." *Id.*, at 596.

We granted the federal parties' petition for a writ of certiorari, 486 U. S. 1042 (1988), to consider whether the regulations invalidated by the Court of Appeals violate the Fourth Amendment. We now reverse.

II

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The Amendment guarantees the privacy, dignity, and security of persons against certain ar-

bitrary and invasive acts by officers of the Government or those acting at their direction. *Camara* v. *Municipal Court of San Francisco*, 387 U. S. 523, 528 (1967). See also *Delaware* v. *Prouse*, 440 U. S. 648, 653–654 (1979); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 554 (1976). Before we consider whether the tests in question are reasonable under the Fourth Amendment, we must inquire whether the tests are attributable to the Government or its agents, and whether they amount to searches or seizures. We turn to those matters.

A

Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government. See *United States* v. *Jacobsen*, 466 U. S. 109, 113–114 (1984); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 487 (1971). See also *Burdeau* v. *McDowell*, 256 U. S. 465, 475 (1921). A railroad that complies with the provisions of Subpart C of the regulations does so by compulsion of sovereign authority, and the lawfulness of its acts is controlled by the Fourth Amendment. Petitioners contend, however, that the Fourth Amendment is not implicated by Subpart D of the regulations, as nothing in Subpart D compels any testing by private railroads.

We are unwilling to conclude, in the context of this facial challenge, that breath and urine tests required by private railroads in reliance on Subpart D will not implicate the Fourth Amendment. Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, cf. *Lustig* v. *United States*, 338 U. S. 74, 78–79 (1949) (plurality opinion); *Byars* v. *United States*, 273 U. S. 28, 32–33 (1927), a question that can only be resolved "in light of all the circumstances," *Coolidge* v. *New Hampshire*, *supra*,

at 487. The fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. Here, specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct.

The regulations, including those in Subpart D, pre-empt state laws, rules, or regulations covering the same subject matter, 49 CFR § 219.13(a) (1987), and are intended to supersede "any provision of a collective bargaining agreement, or arbitration award construing such an agreement," 50 Fed. Reg. 31552 (1985). They also confer upon the FRA the right to receive certain biological samples and test results procured by railroads pursuant to Subpart D. § 219.11(c). In addition, a railroad may not divest itself of, or otherwise compromise by contract, the authority conferred by Subpart D. As the FRA explained, such "authority . . . is conferred for the purpose of promoting the public safety, and a railroad may not shackle itself in a way inconsistent with its duty to promote the public safety." 50 Fed. Reg. 31552 (1985). Nor is a covered employee free to decline his employer's request to submit to breath or urine tests under the conditions set forth in Subpart D. See § 219.11(b). An employee who refuses to submit to the tests must be withdrawn from covered service. See 4 App. to Field Manual 18.

In light of these provisions, we are unwilling to accept petitioners' submission that tests conducted by private railroads in reliance on Subpart D will be primarily the result of private initiative. The Government has removed all legal barriers to the testing authorized by Subpart D, and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions. In addition, it has mandated that the railroads not bargain away the authority to perform tests granted by Subpart D. These are clear indices of the Government's encouragement, endorse-

ment, and participation, and suffice to implicate the Fourth Amendment.

B

Our precedents teach that where, as here, the Government seeks to obtain physical evidence from a person, the Fourth Amendment may be relevant at several levels. See, *e. g.*, *United States* v. *Dionisio*, 410 U. S. 1, 8 (1973). The initial detention necessary to procure the evidence may be a seizure of the person, *Cupp* v. *Murphy*, 412 U. S. 291, 294–295 (1973); *Davis* v. *Mississippi*, 394 U. S. 721, 726–727 (1969), if the detention amounts to a meaningful interference with his freedom of movement. *INS* v. *Delgado*, 466 U. S. 210, 215 (1984); *United States* v. *Jacobsen*, *supra*, at 113, n. 5. Obtaining and examining the evidence may also be a search, see *Cupp* v. *Murphy*, *supra*, at 295; *United States* v. *Dionisio*, *supra*, at 8, 13–14, if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable, see, *e. g.*, *California* v. *Greenwood*, 486 U. S. 35, 43 (1988); *United States* v. *Jacobsen*, *supra*, at 113.

We have long recognized that a "compelled intrusio[n] into the body for blood to be analyzed for alcohol content" must be deemed a Fourth Amendment search. See *Schmerber* v. *California*, 384 U. S. 757, 767–768 (1966). See also *Winston* v. *Lee*, 470 U. S. 753, 760 (1985). In light of our society's concern for the security of one's person, see, *e. g.*, *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968), it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests. Cf. *Arizona* v. *Hicks*, 480 U. S. 321, 324–325 (1987). Much the same is true of the breath-testing procedures required under Subpart D of the regulations. Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, see, *e. g.*, *California* v.

Trombetta, 467 U. S. 479, 481 (1984), implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber*, should also be deemed a search, see 1 W. LaFave, Search and Seizure § 2.6(a), p. 463 (1987). See also *Burnett* v. *Anchorage*, 806 F. 2d 1447, 1449 (CA9 1986); *Shoemaker* v. *Handel*, 795 F. 2d 1136, 1141 (CA3), cert. denied, 479 U. S. 986 (1986).

Unlike the blood-testing procedure at issue in *Schmerber*, the procedures prescribed by the FRA regulations for collecting and testing urine samples do not entail a surgical intrusion into the body. It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. As the Court of Appeals for the Fifth Circuit has stated:

> "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom." *National Treasury Employees Union* v. *Von Raab*, 816 F. 2d 170, 175 (1987).

Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.[4]

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[4] See, *e. g.*, *Lovvorn* v. *Chattanooga*, 846 F. 2d 1539, 1542 (CA6 1988); *Copeland* v. *Philadelphia Police Dept.*, 840 F. 2d 1139, 1143 (CA3 1988), cert. pending No. 88-66; *Railway Labor Executives' Assn.* v. *Burnley*, 839 F. 2d 575, 580 (CA9 1988) (case below); *Everett* v. *Napper*, 833 F. 2d 1507, 1511 (CA11 1987); *Jones* v. *McKenzie*, 266 U. S. App. D. C. 85, 88, 833 F.

In view of our conclusion that the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches, we need not characterize the employer's antecedent interference with the employee's freedom of movement as an independent Fourth Amendment seizure. As our precedents indicate, not every governmental interference with an individual's freedom of movement raises such constitutional concerns that there is a seizure of the person. See *United States* v. *Dionisio*, *supra*, at 9–11 (grand jury subpoena, though enforceable by contempt, does not effect a seizure of the person); *United States* v. *Mara*, 410 U. S. 19, 21 (1973) (same). For present purposes, it suffices to note that any limitation on an employee's freedom of movement that is necessary to obtain the blood, urine, or breath samples contemplated by the regulations must be considered in assessing the intrusiveness of the searches effected by the Government's testing program. Cf. *United States* v. *Place*, 462 U. S. 696, 707–709 (1983).

III

A

To hold that the Fourth Amendment is applicable to the drug and alcohol testing prescribed by the FRA regulations

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2d 335, 338 (1987); *National Treasury Employees Union* v. *Von Raab*, 816 F. 2d 170, 176 (CA5 1987), aff'd in pertinent part, *post*, p. 656; *McDonell* v. *Hunter*, 809 F. 2d 1302, 1307 (CA8 1987); *Division 241 Amalgamated Transit Union* v. *Suscy*, 538 F. 2d 1264, 1266–1267 (CA7), cert. denied, 429 U. S. 1029 (1976). See also *Alverado* v. *Washington Public Power Supply System*, 111 Wash. 2d 424, 434, 759 P. 2d 427, 432–433 (1988), cert. pending, No. 88-645.

Taking a blood or urine sample might also be characterized as a Fourth Amendment seizure, since it may be viewed as a meaningful interference with the employee's possessory interest in his bodily fluids. Cf. *United States* v. *Jacobsen*, 466 U. S. 109, 113 (1984). It is not necessary to our analysis in this case, however, to characterize the taking of blood or urine samples as a seizure of those bodily fluids, for the privacy expectations protected by this characterization are adequately taken into account by our conclusion that such intrusions are searches.

is only to begin the inquiry into the standards governing such intrusions. *O'Connor* v. *Ortega*, 480 U. S. 709, 719 (1987) (plurality opinion); *New Jersey* v. *T. L. O.*, 469 U. S. 325, 337 (1985). For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. *United States* v. *Sharpe*, 470 U. S. 675, 682 (1985); *Schmerber* v. *California*, 384 U. S., at 768. What is reasonable, of course, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *United States* v. *Montoya de Hernandez*, 473 U. S. 531, 537 (1985). Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U. S., at 654; *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976).

In most criminal cases, we strike this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment. See *United States* v. *Place*, *supra*, at 701, and n. 2; *United States* v. *United States District Court*, 407 U. S. 297, 315 (1972). Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. See, *e. g.*, *Payton* v. *New York*, 445 U. S. 573, 586 (1980); *Mincey* v. *Arizona*, 437 U. S. 385, 390 (1978). We have recognized exceptions to this rule, however, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Griffin* v. *Wisconsin*, 483 U. S. 868, 873 (1987), quoting *New Jersey* v. *T. L. O.*, *supra*, at 351 (BLACKMUN, J., concurring in judgment). When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context. See, *e. g.*, *Griffin* v. *Wisconsin*, *supra*, at 873 (search of probationer's home); *New York* v.

Burger, 482 U. S. 691, 699–703 (1987) (search of premises of certain highly regulated businesses); *O'Connor* v. *Ortega*, *supra*, at 721–725 (work-related searches of employees' desks and offices); *New Jersey* v. *T. L. O.*, *supra*, at 337–342 (search of student's property by school officials); *Bell* v. *Wolfish*, 441 U. S. 520, 558–560 (1979) (body cavity searches of prison inmates).

The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, "likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Griffin* v. *Wisconsin*, *supra*, at 873–874. The hours of service employees covered by the FRA regulations include persons engaged in handling orders concerning train movements, operating crews, and those engaged in the maintenance and repair of signal systems. 50 Fed. Reg. 31511 (1985). It is undisputed that these and other covered employees are engaged in safety-sensitive tasks. The FRA so found, and respondents conceded the point at oral argument. Tr. of Oral Arg. 46–47. As we have recognized, the whole premise of the Hours of Service Act is that "[t]he length of hours of service has direct relation to the efficiency of the human agencies upon which protection [of] life and property necessarily depends." *Baltimore & Ohio R. Co.* v. *ICC*, 221 U. S. 612, 619 (1911). See also *Atchison, T. & S. F. R. Co.* v. *United States*, 244 U. S. 336, 342 (1917) ("[I]t must be remembered that the purpose of the act was to prevent the dangers which must necessarily arise to the employee and to the public from continuing men in a dangerous and hazardous business for periods so long as to render them unfit to give that service which is essential to the protection of themselves and those entrusted to their care").

The FRA has prescribed toxicological tests, not to assist in the prosecution of employees, but rather "to prevent acci-

dents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." 49 CFR § 219.1(a) (1987).[5] This governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justifies prohibiting covered employees from using alcohol or drugs on duty, or while subject to being called for duty. This interest also "require[s] and justif[ies] the exercise of supervision to assure that the restrictions are in fact observed." *Griffin* v. *Wisconsin*, *supra*, at 875. The question that remains, then, is whether the Government's need to monitor compliance with these restrictions justifies the privacy intrusions at issue absent a warrant or individualized suspicion.

B

An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search

[5] The regulations provide that "[e]ach sample provided under [Subpart C] is retained for not less than six months following the date of the accident or incident and may be made available to . . . a party in litigation upon service of appropriate compulsory process on the custodian . . . ." 49 CFR § 219.211(d) (1987). The FRA explained, when it promulgated this provision, that it intends to retain such samples primarily "for its own purposes (*e. g.*, to permit reanalysis of a sample if another laboratory reported detection of a substance not tested for in the original procedure)." 50 Fed. Reg. 31545 (1985). While this provision might be read broadly to authorize the release of biological samples to law enforcement authorities, the record does not disclose that it was intended to be, or actually has been, so used. Indeed, while respondents aver generally that test results might be made available to law enforcement authorities, Brief for Respondents 24, they do not seriously contend that this provision, or any other part of the administrative scheme, was designed as "a 'pretext' to enable law enforcement authorities to gather evidence of penal law violations." *New York* v. *Burger*, 482 U. S. 691, 716–717, n. 27 (1987). Absent a persuasive showing that the FRA's testing program is pretextual, we assess the FRA's scheme in light of its obvious administrative purpose. We leave for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, or otherwise impugn the administrative nature of the FRA's program.

or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope. See, *e. g.*, *New York* v. *Burger*, *supra*, at 703; *United States* v. *Chadwick*, 433 U. S. 1, 9 (1977); *Camara* v. *Municipal Court of San Francisco*, 387 U. S., at 532. A warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case. See *United States* v. *Chadwick*, *supra*, at 9. In the present context, however, a warrant would do little to further these aims. Both the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees. Cf. *United States* v. *Biswell*, 406 U. S. 311, 316 (1972). Indeed, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate. Cf. *Colorado* v. *Bertine*, 479 U. S. 367, 376 (1987) (BLACKMUN, J., concurring).[6]

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[6] Subpart C of the regulations, for example, does not permit the exercise of any discretion in choosing the employees who must submit to testing, except in limited circumstances and then only if warranted by objective criteria. See n. 2, *supra*. Subpart D, while conferring some discretion to choose those who may be required to submit to testing, also imposes specific constraints on the exercise of that discretion. Covered employees may be required to submit to breath or urine tests only if they have been directly involved in specified rule violations or errors, or if their acts or omissions contributed to the occurrence or severity of specified accidents or incidents. To be sure, some discretion necessarily must be used in determining whether an employee's acts or omissions contributed to the occurrence or severity of an event, but this limited assessment of the objective circumstances surrounding the event does not devolve unbridled discretion upon the supervisor in the field. Cf. *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 323 (1978).

In addition, the regulations contain various safeguards against any possibility that discretion will be abused. A railroad that requires post-

We have recognized, moreover, that the government's interest in dispensing with the warrant requirement is at its strongest when, as here, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara* v. *Municipal Court of San Francisco*, *supra*, at 533. See also *New Jersey* v. *T. L. O.*, 469 U. S., at 340; *Donovan* v. *Dewey*, 452 U. S. 594, 603 (1981). As the FRA recognized, alcohol and other drugs are eliminated from the bloodstream at a constant rate, see 49 Fed. Reg. 24291 (1984), and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible. See *Schmerber* v. *California*, 384 U. S., at 770–771. Although the metabolites of some drugs remain in the urine for longer periods of time and may enable the FRA to estimate whether the employee was impaired by those drugs at the time of a covered accident, incident, or rule violation, 49 Fed. Reg. 24291 (1984), the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence.

The Government's need to rely on private railroads to set the testing process in motion also indicates that insistence on a warrant requirement would impede the achievement of the Government's objective. Railroad supervisors, like school officials, see *New Jersey* v. *T. L. O.*, *supra*, at 339–340, and hospital administrators, see *O'Connor* v. *Ortega*, 480 U. S., at 722, are not in the business of investigating violations of the criminal laws or enforcing administrative codes, and otherwise have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence. "Imposing unwieldy warrant procedures . . . upon supervi-

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accident testing in bad faith, 49 CFR § 219.201(c) (1987), or that willfully imposes a program of authorized testing that does not comply with Subpart D, § 219.9(a)(3), or that otherwise fails to follow the regulations, § 219.9 (a)(5), is subject to civil penalties, see pt. 219, App. A, p. 105, in addition to whatever damages may be awarded through the arbitration process.

sors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable." *Ibid.*

In sum, imposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulations, while significantly hindering, and in many cases frustrating, the objectives of the Government's testing program. We do not believe that a warrant is essential to render the intrusions here at issue reasonable under the Fourth Amendment.

C

Our cases indicate that even a search that may be performed without a warrant must be based, as a general matter, on probable cause to believe that the person to be searched has violated the law. See *New Jersey* v. *T. L. O.*, *supra*, at 340. When the balance of interests precludes insistence on a showing of probable cause, we have usually required "some quantum of individualized suspicion" before concluding that a search is reasonable. See, *e. g.*, *United States* v. *Martinez-Fuerte*, 428 U. S., at 560. We made it clear, however, that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. *Id.*, at 561. In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.

By and large, intrusions on privacy under the FRA regulations are limited. To the extent transportation and like restrictions are necessary to procure the requisite blood, breath, and urine samples for testing, this interference alone is minimal given the employment context in which it takes place. Ordinarily, an employee consents to significant restrictions in his freedom of movement where necessary for

his employment, and few are free to come and go as they please during working hours. See, *e. g.*, *INS* v. *Delgado*, 466 U. S., at 218. Any additional interference with a railroad employee's freedom of movement that occurs in the time it takes to procure a blood, breath, or urine sample for testing cannot, by itself, be said to infringe significant privacy interests.

Our decision in *Schmerber* v. *California*, *supra*, indicates that the same is true of the blood tests required by the FRA regulations. In that case, we held that a State could direct that a blood sample be withdrawn from a motorist suspected of driving while intoxicated, despite his refusal to consent to the intrusion. We noted that the test was performed in a reasonable manner, as the motorist's "blood was taken by a physician in a hospital environment according to accepted medical practices." *Id.*, at 771. We said also that the intrusion occasioned by a blood test is not significant, since such "tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Ibid.* *Schmerber* thus confirmed "society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity." *Winston* v. *Lee*, 470 U. S., at 762. See also *South Dakota* v. *Neville*, 459 U. S. 553, 563 (1983) ("The simple blood-alcohol test is . . . safe, painless, and commonplace"); *Breithaupt* v. *Abram*, 352 U. S. 432, 436 (1957) ("The blood test procedure has become routine in our everyday life").

The breath tests authorized by Subpart D of the regulations are even less intrusive than the blood tests prescribed by Subpart C. Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in the employee's bloodstream and nothing more.

Like the blood-testing procedures mandated by Subpart C, which can be used only to ascertain the presence of alcohol or controlled substances in the bloodstream, breath tests reveal no other facts in which the employee has a substantial privacy interest. Cf. *United States* v. *Jacobsen*, 466 U. S., at 123; *United States* v. *Place*, 462 U. S., at 707. In all the circumstances, we cannot conclude that the administration of a breath test implicates significant privacy concerns.

A more difficult question is presented by urine tests. Like breath tests, urine tests are not invasive of the body and, under the regulations, may not be used as an occasion for inquiring into private facts unrelated to alcohol or drug use.[7] We recognize, however, that the procedures for collecting the necessary samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not implicated by blood or breath tests. While we would not characterize these additional privacy concerns as minimal in most contexts, we note that the regulations endeavor to reduce the intrusiveness of the collection process. The regulations do not require that samples be furnished under the direct observation of a monitor, despite the desirability of such a procedure to ensure the integrity of the sample. See 50 Fed. Reg. 31555 (1985). See also Field Manual B–15, D–1. The sample is also collected in a medical environment, by personnel unrelated to the railroad

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[7] When employees produce the blood and urine samples required by Subpart C, they are asked by medical personnel to complete a form stating whether they have taken any medications during the preceding 30 days. The completed forms are shipped with the samples to the FRA's laboratory. See Field Manual B–15. This information is used to ascertain whether a positive test result can be explained by the employee's lawful use of medications. While this procedure permits the Government to learn certain private medical facts that an employee might prefer not to disclose, there is no indication that the Government does not treat this information as confidential, or that it uses the information for any other purpose. Under the circumstances, we do not view this procedure as a significant invasion of privacy. Cf. *Whalen* v. *Roe*, 429 U. S. 589, 602 (1977).

employer, and is thus not unlike similar procedures encountered often in the context of a regular physical examination.

More importantly, the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees. This relation between safety and employee fitness was recognized by Congress when it enacted the Hours of Service Act in 1907, *Baltimore & Ohio R. Co.* v. *ICC*, 221 U. S., at 619, and also when it authorized the Secretary to "test . . . railroad facilities, equipment, rolling stock, operations, *or persons*, as he deems necessary to carry out the provisions" of the Federal Railroad Safety Act of 1970. 45 U. S. C. § 437(a) (emphasis added). It has also been recognized by state governments,[8] and has long been reflected in industry practice, as evidenced by the industry's promulgation and enforcement of Rule G. Indeed, the FRA found, and the Court of Appeals acknowledged, see 839 F. 2d, at 585, that "most railroads require periodic physical examinations for train and engine employees and certain other employees." 49 Fed. Reg. 24278 (1984). See also *Railway Labor Executives Assn.* v. *Norfolk & Western R. Co.*, 833 F. 2d 700, 705–706 (CA7 1987); *Brotherhood of Maintenance of*

[8] See, *e. g.*, Ala. Code § 37–2–85 (1977) (requiring that persons to be employed as dispatchers, engineers, conductors, brakemen, and switchmen be subjected to a "thorough examination" respecting, *inter alia*, their skill, sobriety, eyesight, and hearing); Mass. Gen. Laws §§ 160:178–160:181 (1979) (prescribing eyesight examination and experience requirements for railroad engineers and conductors); N. Y. R. R. Law § 63 (McKinney 1952) (requiring that all applicants for positions as motormen or gripmen "be subjected to a thorough examination . . . as to their habits, physical ability, and intelligence"). See also *Nashville, C. & S. L. R. Co.* v. *Alabama*, 128 U. S. 96, 98–99 (1888) (noting, in upholding a predecessor of Alabama's fitness-for-duty statute against a Commerce Clause challenge, that a State may lawfully require railway employees to undergo eye examinations in the interests of safety).

Way Employees, Lodge 16 v. *Burlington Northern R. Co.*, 802 F. 2d 1016, 1024 (CA8 1986).

We do not suggest, of course, that the interest in bodily security enjoyed by those employed in a regulated industry must always be considered minimal. Here, however, the covered employees have long been a principal focus of regulatory concern. As the dissenting judge below noted: "The reason is obvious. An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." 839 F. 2d, at 593. Though some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees and to this reasonable means of procuring such information. We conclude, therefore, that the testing procedures contemplated by Subparts C and D pose only limited threats to the justifiable expectations of privacy of covered employees.

By contrast, the Government interest in testing without a showing of individualized suspicion is compelling. Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities, see, *e. g.*, *Rushton* v. *Nebraska Public Power Dist.*, 844 F. 2d 562, 566 (CA8 1988); *Alverado* v. *Washington Public Power Supply System*, 111 Wash. 2d 424, 436, 759 P. 2d 427, 433–434 (1988), cert. pending, No. 88–645, employees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others. An impaired employee, the FRA found, will seldom display any outward "signs detectable by the lay person or, in many cases, even the physician." 50 Fed. Reg. 31526 (1985). This view finds

ample support in the railroad industry's experience with Rule G, and in the judgment of the courts that have examined analogous testing schemes. See, *e. g.*, *Brotherhood of Maintenance Way Employees, Lodge 16* v. *Burlington Northern R. Co.*, *supra*, at 1020. Indeed, while respondents posit that impaired employees might be detected without alcohol or drug testing,[9] the premise of respondents' lawsuit is that even the occurrence of a major calamity will not give rise to a suspicion of impairment with respect to any particular employee.

While no procedure can identify all impaired employees with ease and perfect accuracy, the FRA regulations supply an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place. 50 Fed. Reg. 31541 (1985). The railroad industry's experience with Rule G persuasively shows, and common sense confirms, that the customary dismissal sanc-

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[9] Respondents offer a list of "less drastic and equally effective means" of addressing the Government's concerns, including reliance on the private proscriptions already in force, and training supervisory personnel "to effectively detect employees who are impaired by drug or alcohol use without resort to such intrusive procedures as blood and urine tests." Brief for Respondents 40–43. We have repeatedly stated, however, that "[t]he reasonableness of any particular government activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois* v. *Lafayette*, 462 U. S. 640, 647 (1983). See also *Colorado* v. *Bertine*, 479 U. S. 367, 373–374 (1987). It is obvious that "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers," *United States* v. *Martinez-Fuerte*, 428 U. S., at 556–557, n. 12, because judges engaged in *post hoc* evaluations of government conduct "'can almost always imagine some alternative means by which the objectives of the [government] might have been accomplished.'" *United States* v. *Montoya de Hernandez*, 473 U. S. 531, 542 (1985), quoting *United States* v. *Sharpe*, 470 U. S. 675, 686–687 (1985). Here, the FRA expressly considered various alternatives to its drug-screening program and reasonably found them wanting. At bottom, respondents' insistence on less drastic alternatives would require us to second-guess the reasonable conclusions drawn by the FRA after years of investigation and study. This we decline to do.

tion that threatens employees who use drugs or alcohol while on duty cannot serve as an effective deterrent unless violators know that they are likely to be discovered. By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, cf. *Griffin* v. *Wisconsin*, 483 U. S., at 876, concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.

The testing procedures contemplated by Subpart C also help railroads obtain invaluable information about the causes of major accidents, see 50 Fed. Reg. 31541 (1985), and to take appropriate measures to safeguard the general public. Cf. *Michigan* v. *Tyler*, 436 U. S. 499, 510 (1978) (noting that prompt investigation of the causes of a fire may uncover continuing dangers and thereby prevent the fire's recurrence); *Michigan* v. *Clifford*, 464 U. S. 287, 308 (1984) (REHNQUIST, J., dissenting) (same). Positive test results would point toward drug or alcohol impairment on the part of members of the crew as a possible cause of an accident, and may help to establish whether a particular accident, otherwise not drug related, was made worse by the inability of impaired employees to respond appropriately. Negative test results would likewise furnish invaluable clues, for eliminating drug impairment as a potential cause or contributing factor would help establish the significance of equipment failure, inadequate training, or other potential causes, and suggest a more thorough examination of these alternatives. Tests performed following the rule violations specified in Subpart D likewise can provide valuable information respecting the causes of those transgressions, which the FRA found to involve "the potential for a serious train accident or grave personal injury, or both." 50 Fed. Reg. 31553 (1985).

A requirement of particularized suspicion of drug or alcohol use would seriously impede an employer's ability to obtain this information, despite its obvious importance. Experience confirms the FRA's judgment that the scene of a serious rail accident is chaotic. Investigators who arrive at the scene shortly after a major accident has occurred may find it difficult to determine which members of a train crew contributed to its occurrence. Obtaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a serious accident. While events following the rule violations that activate the testing authority of Subpart D may be less chaotic, objective indicia of impairment are absent in these instances as well. Indeed, any attempt to gather evidence relating to the possible impairment of particular employees likely would result in the loss or deterioration of the evidence furnished by the tests. Cf. *Michigan* v. *Clifford*, *supra*, at 293, n. 4 (plurality opinion); *Michigan* v. *Tyler*, *supra*, at 510. It would be unrealistic, and inimical to the Government's goal of ensuring safety in rail transportation, to require a showing of individualized suspicion in these circumstances.

Without quarreling with the importance of these governmental interests, the Court of Appeals concluded that the postaccident testing regulations were unreasonable because "[b]lood and urine tests intended to establish drug use other than alcohol . . . cannot measure current drug intoxication or degree of impairment." 839 F. 2d, at 588. The court based its conclusion on its reading of certain academic journals that indicate that the testing of urine can disclose only drug metabolites, which "may remain in the body for days or weeks after the ingestion of the drug." *Id.*, at 589. We find this analysis flawed for several reasons.

As we emphasized in *New Jersey* v. *T. L. O.*, "it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but

only have 'any tendency to make the existence of any fact that is of consequence to the determination [of the point in issue] more probable or less probable than it would be without the evidence.'" 469 U. S., at 345, quoting Fed. Rule Evid. 401. Even if urine test results disclosed nothing more specific than the recent use of controlled substances by a covered employee, this information would provide the basis for further investigative work designed to determine whether the employee used drugs at the relevant times. See Field Manual B–4. The record makes clear, for example, that a positive test result, coupled with known information concerning the pattern of elimination for the particular drug and information that may be gathered from other sources about the employee's activities, may allow the FRA to reach an informed judgment as to how a particular accident occurred. See *supra*, at 609–610.

More importantly, the Court of Appeals overlooked the FRA's policy of placing principal reliance on the results of blood tests, which unquestionably can identify very recent drug use, see, *e. g.*, 49 Fed. Reg. 24291 (1984), while relying on urine tests as a secondary source of information designed to guard against the possibility that certain drugs will be eliminated from the bloodstream before a blood sample can be obtained. The court also failed to recognize that the FRA regulations are designed not only to discern impairment but also to deter it. Because the record indicates that blood and urine tests, taken together, are highly effective means of ascertaining on-the-job impairment and of deterring the use of drugs by railroad employees, we believe the Court of Appeals erred in concluding that the postaccident testing regulations are not reasonably related to the Government objectives that support them.[10]

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[10] The Court of Appeals also expressed concern that the tests might be quite unreliable, and thus unreasonable. 839 F. 2d, at 589. The record compiled by the FRA after years of investigation and study does not support this conclusion. While it is impossible to guarantee that no mistakes

We conclude that the compelling Government interests served by the FRA's regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee. In view of our conclusion that, on the present record, the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, the Government's compelling interests outweigh privacy concerns.

IV

The possession of unlawful drugs is a criminal offense that the Government may punish, but it is a separate and far more dangerous wrong to perform certain sensitive tasks while under the influence of those substances. Performing those tasks while impaired by alcohol is, of course, equally dangerous, though consumption of alcohol is legal in most other contexts. The Government may take all necessary and reasonable regulatory steps to prevent or deter that hazardous conduct, and since the gravamen of the evil is performing certain functions while concealing the substance in the body, it may be necessary, as in the case before us, to examine the body or its fluids to accomplish the regulatory purpose. The necessity to perform that regulatory function with respect to railroad employees engaged in safety-sensitive tasks, and the reasonableness of the system for doing so, have been established in this case.

Alcohol and drug tests conducted in reliance on the authority of Subpart D cannot be viewed as private action outside the reach of the Fourth Amendment. Because the testing procedures mandated or authorized by Subparts C and D ef-

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will ever be made in isolated cases, respondents have challenged the administrative scheme on its face. We deal therefore with whether the tests contemplated by the regulations can *ever* be conducted. Cf. *Bell* v. *Wolfish*, 441 U. S. 520, 560 (1979). Respondents have provided us with no reason for doubting the FRA's conclusion that the tests at issue here are accurate in the overwhelming majority of cases.

fect searches of the person, they must meet the Fourth Amendment's reasonableness requirement. In light of the limited discretion exercised by the railroad employers under the regulations, the surpassing safety interests served by toxicological tests in this context, and the diminished expectation of privacy that attaches to information pertaining to the fitness of covered employees, we believe that it is reasonable to conduct such tests in the absence of a warrant or reasonable suspicion that any particular employee may be impaired. We hold that the alcohol and drug tests contemplated by Subparts C and D of the FRA's regulations are reasonable within the meaning of the Fourth Amendment. The judgment of the Court of Appeals is accordingly reversed.

It is so ordered.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

In my opinion the public interest in determining the causes of serious railroad accidents adequately supports the validity of the challenged regulations. I am not persuaded, however, that the interest in deterring the use of alcohol or drugs is either necessary or sufficient to justify the searches authorized by these regulations.

I think it a dubious proposition that the regulations significantly deter the use of alcohol and drugs by hours of service employees. Most people—and I would think most railroad employees as well—do not go to work with the expectation that they may be involved in a major accident, particularly one causing such catastrophic results as loss of life or the release of hazardous material requiring an evacuation. Moreover, even if they are conscious of the possibilities that such an accident might occur and that alcohol or drug use might be a contributing factor, if the risk of serious personal injury does not deter their use of these substances, it seems highly unlikely that the additional threat of loss of employment would have any effect on their behavior.

For this reason, I do not join the portions of Part III of the Court's opinion that rely on a deterrence rationale; I do, however, join the balance of the opinion and the Court's judgment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The issue in this case is not whether declaring a war on illegal drugs is good public policy. The importance of ridding our society of such drugs is, by now, apparent to all. Rather, the issue here is whether the Government's deployment in that war of a particularly Draconian weapon—the compulsory collection and chemical testing of railroad workers' blood and urine—comports with the Fourth Amendment. Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases, *Hirabayashi* v. *United States*, 320 U. S. 81 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944), and the Red scare and McCarthy-era internal subversion cases, *Schenck* v. *United States*, 249 U. S. 47 (1919); *Dennis* v. *United States*, 341 U. S. 494 (1951), are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.

In permitting the Government to force entire railroad crews to submit to invasive blood and urine tests, even when it lacks any evidence of drug or alcohol use or other wrongdoing, the majority today joins those shortsighted courts which have allowed basic constitutional rights to fall prey to momentary emergencies. The majority holds that the need of the Federal Railroad Administration (FRA) to deter and diagnose train accidents outweighs any "minimal" intrusions on personal dignity and privacy posed by mass toxicological testing of persons who have given no indication whatsoever of

impairment. *Ante*, at 624. In reaching this result, the majority ignores the text and doctrinal history of the Fourth Amendment, which require that highly intrusive searches of this type be based on probable cause, not on the evanescent cost-benefit calculations of agencies or judges. But the majority errs even under its own utilitarian standards, trivializing the raw intrusiveness of, and overlooking serious conceptual and operational flaws in, the FRA's testing program. These flaws cast grave doubts on whether that program, though born of good intentions, will do more than ineffectually symbolize the Government's opposition to drug use.

The majority purports to limit its decision to postaccident testing of workers in "safety-sensitive" jobs, *ante*, at 620, much as it limits its holding in the companion case to the testing of transferees to jobs involving drug interdiction or the use of firearms. *Treasury Employees* v. *Von Raab*, *post*, at 664. But the damage done to the Fourth Amendment is not so easily cabined. The majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens. I therefore dissent.

I

The Court today takes its longest step yet toward reading the probable-cause requirement out of the Fourth Amendment. For the fourth time in as many years, a majority holds that a "'special nee[d], beyond the normal need for law enforcement,'" makes the "'requirement'" of probable cause "'impracticable.'" *Ante*, at 619 (citations omitted). With the recognition of "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety" as such a need, *ante*, at 620, the Court has now permitted "special needs" to displace constitutional text in each of the four categories of searches enumerated in the Fourth Amendment: searches of "persons," *ante*, at 613–614; "houses," *Griffin* v. *Wisconsin*, 483 U. S. 868 (1987); "papers," *O'Connor* v. *Or-*

tega, 480 U. S. 709 (1987); and "effects," *New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985).

The process by which a constitutional "requirement" can be dispensed with as "impracticable" is an elusive one to me. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The majority's recitation of the Amendment, remarkably, leaves off after the word "violated," *ante*, at 613, but the remainder of the Amendment—the Warrant Clause—is not so easily excised. As this Court has long recognized, the Framers intended the provisions of that Clause—a warrant and probable cause—to "provide the yardstick against which official searches and seizures are to be measured." *T. L. O.*, *supra*, at 359–360 (opinion of BRENNAN, J.). Without the content which those provisions give to the Fourth Amendment's overarching command that searches and seizures be "reasonable," the Amendment lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term. See *Dunaway* v. *New York*, 442 U. S. 200, 213 (1979) ("[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases"). Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when "special needs" make them seem not.

Until recently, an unbroken line of cases had recognized probable cause as an indispensable prerequisite for a full-scale search, regardless of whether such a search was conducted pursuant to a warrant or under one of the recognized exceptions to the warrant requirement. *T. L. O.*, *supra*, at 358

and 359, n. 3 (opinion of BRENNAN, J.); see also *Chambers* v. *Maroney*, 399 U. S. 42, 51 (1970). Only where the government action in question had a "substantially less intrusive" impact on privacy, *Dunaway*, 442 U. S., at 210, and thus clearly fell short of a full-scale search, did we relax the probable-cause standard. *Id.*, at 214 ("For all but those narrowly defined intrusions, the requisite 'balancing' . . . is embodied in the principle that seizures are 'reasonable' only if supported by probable cause"); see also *T. L. O.*, *supra*, at 360 (opinion of BRENNAN, J.). Even in this class of cases, we almost always required the government to show some individualized suspicion to justify the search.[1] The few searches which we upheld in the absence of individualized justification were routinized, fleeting, and nonintrusive encounters conducted pursuant to regulatory programs which entailed no contact with the person.[2]

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[1] The first, and leading, case of a minimally intrusive search held valid when based on suspicion short of probable cause is *Terry* v. *Ohio*, 392 U. S. 1, 30 (1968), where we held that a police officer who observes unusual conduct suggesting criminal activity by persons he reasonably suspects are armed and presently dangerous may "conduct a carefully limited search of the outer clothing of such persons." See also *United States* v. *Hensley*, 469 U. S. 221 (1985) (upholding brief stop of person described on wanted flyer while police ascertain if arrest warrant has been issued); *Delaware* v. *Prouse*, 440 U. S. 648 (1979) (invalidating discretionary stops of motorists to check licenses and registrations when not based on reasonable suspicion that the motorist is unlicensed, the automobile is unregistered, or that the vehicle or an occupant should otherwise be detained); *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) (upholding limited search where officers who had lawfully stopped car saw a large bulge under the driver's jacket); *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975) (upholding brief stops by roving border patrols where officers reasonably believe car may contain illegal aliens); *Adams* v. *Williams*, 407 U. S. 143 (1972) (upholding brief stop to interrogate suspicious individual believed to be carrying narcotics and gun).

[2] See, *e. g.*, *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976) (brief interrogative stop at permanent border checkpoint to ascertain motorist's residence status); *Camara* v. *Municipal Court of San Fran-*

In the four years since this Court, in *T. L. O.*, first began recognizing "special needs" exceptions to the Fourth Amendment, the clarity of Fourth Amendment doctrine has been badly distorted, as the Court has eclipsed the probable-cause requirement in a patchwork quilt of settings: public school principals' searches of students' belongings, *T. L. O.;* public employers' searches of employees' desks, *O'Connor;* and probation officers' searches of probationers' homes, *Griffin.*[3] Tellingly, each time the Court has found that "special needs" counseled ignoring the literal requirements of the Fourth Amendment for such full-scale searches in favor of a formless and unguided "reasonableness" balancing inquiry, it has concluded that the search in question satisfied that test. I have joined dissenting opinions in each of these cases, protesting the "jettison[ing of] . . . the only standard that finds support in the text of the Fourth Amendment" and predicting that the majority's "Rohrschach-like 'balancing test'" portended "a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens." *T. L. O.*, *supra*, at 357–358 (opinion of BRENNAN, J.).

The majority's decision today bears out that prophecy. After determining that the Fourth Amendment applies to the FRA's testing regime, the majority embarks on an extended inquiry into whether that regime is "reasonable," an inquiry in which it balances "'all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Ante*, at 619, quoting *United States* v. *Montoya de*

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cisco, 387 U. S. 523 (1967) (routine annual inspection by city housing department).

[3] The "special needs" the Court invoked to justify abrogating the probable-cause requirement were, in *New Jersey* v. *T. L. O.*, 469 U. S., at 341, "the substantial need of teachers and administrators for freedom to maintain order in the schools"; in *O'Connor* v. *Ortega*, 480 U. S., at 725, "the efficient and proper operation of the workplace"; and in *Griffin* v. *Wisconsin*, 483 U. S., at 878, the need to preserve "the deterrent effect of the supervisory arrangement" of probation.

Hernandez, 473 U. S. 531, 537 (1985). The result is "special needs" balancing analysis' deepest incursion yet into the core protections of the Fourth Amendment. Until today, it was conceivable that, when a government search was aimed at a person and not simply the person's possessions, balancing analysis had no place. No longer: with nary a word of explanation or acknowledgment of the novelty of its approach, the majority extends the "special needs" framework to a regulation involving compulsory blood withdrawal and urinary excretion, and chemical testing of the bodily fluids collected through these procedures. And until today, it was conceivable that a prerequisite for surviving "special needs" analysis was the existence of individualized suspicion. No longer: in contrast to the searches in *T. L. O.*, *O'Connor*, and *Griffin*, which were supported by individualized evidence suggesting the culpability of the persons whose property was searched,[4] the regulatory regime upheld today requires the postaccident collection and testing of the blood and urine of *all* covered employees—even if every member of this group gives every indication of sobriety and attentiveness.

In widening the "special needs" exception to probable cause to authorize searches of the human body unsupported by *any* evidence of wrongdoing, the majority today completes the process begun in *T. L. O.* of eliminating altogether the probable-cause requirement for civil searches—those undertaken for reasons "beyond the normal need for law enforcement." *Ante*, at 619 (citations omitted). In its place, the majority substitutes a manipulable balancing inquiry under which, upon the mere assertion of a "special need," even the deepest dignitary and privacy interests become vul-

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[4] See *T. L. O.*, *supra*, at 346 (teacher's report that student had been smoking provided reasonable suspicion that purse contained cigarettes); *O'Connor*, *supra*, at 726 (charges of specific financial improprieties gave employer individualized suspicion of misconduct by employee); *Griffin*, *supra*, at 879–880 (tip to police officer that probationer was storing guns in his apartment provided reasonable suspicion).

nerable to governmental incursion. See *ibid.* (distinguishing criminal from civil searches). By its terms, however, the Fourth Amendment—unlike the Fifth and Sixth—does not confine its protections to either criminal or civil actions. Instead, it protects generally "[t]he right of the people to be secure."[5]

The fact is that the malleable "special needs" balancing approach can be justified only on the basis of the policy results it allows the majority to reach. The majority's concern with the railroad safety problems caused by drug and alcohol abuse is laudable; its cavalier disregard for the text of the Constitution is not. There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest. *Coolidge* v. *New Hampshire*, 403 U. S. 443, 455 (1971). Because abandoning the explicit protections of the Fourth Amendment seriously imperils "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men," *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting), I reject the majority's "special needs" rationale as unprincipled and dangerous.

II

The proper way to evaluate the FRA's testing regime is to use the same analytic framework which we have traditionally used to appraise Fourth Amendment claims involving full-scale searches, at least until the recent "special needs" cases. Under that framework, we inquire, serially, whether a

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[5] That the Fourth Amendment applies equally to criminal and civil searches was emphasized, ironically enough, in the portion of *T. L. O.* holding the Fourth Amendment applicable to schoolhouse searches. 469 U. S., at 335. The malleability of "special needs" balancing thus could not be clearer: the majority endorses the applicability of the Fourth Amendment to civil searches in determining whether a search has taken place, but then wholly ignores it in the subsequent inquiry into the validity of that search.

search has taken place, see, *e. g.*, *Katz* v. *United States*, 389 U. S. 347, 350–353 (1967); whether the search was based on a valid warrant or undertaken pursuant to a recognized exception to the warrant requirement, see, *e. g.*, *Welsh* v. *Wisconsin*, 466 U. S. 740, 748–750 (1984); whether the search was based on probable cause or validly based on lesser suspicion because it was minimally intrusive, see, *e. g.*, *Dunaway*, 442 U. S., at 208–210; and, finally, whether the search was conducted in a reasonable manner, see, *e. g.*, *Winston* v. *Lee*, 470 U. S. 753, 763–766 (1985). See also *T. L. O.*, 469 U. S., at 354–355 (opinion of BRENNAN, J.) (summarizing analytic framework).

The majority's threshold determination that "covered" railroad employees have been searched under the FRA's testing program is certainly correct. *Ante*, at 616–618. Who among us is not prepared to consider reasonable a person's expectation of privacy with respect to the extraction of his blood, the collection of his urine, or the chemical testing of these fluids? *United States* v. *Jacobsen*, 466 U. S. 109, 113 (1984).[6] The majority's ensuing conclusion that the warrant requirement may be dispensed with, however, conveniently overlooks the fact that there are three distinct searches at issue. Although the importance of collecting blood and urine samples before drug or alcohol metabolites disappear justifies waiving the warrant requirement for those two searches under the narrow "exigent circumstances" exception, see *Schmerber* v. *California*, 384 U. S. 757, 770 (1966) ("[T]he delay necessary to obtain a warrant . . . threaten[s] 'the destruction of evidence'"), no such exigency prevents railroad officials from securing a warrant before chemically testing the samples they obtain. Blood and urine do not spoil if

[6]The FRA's breath-testing procedures also constitute searches subject to constitutional safeguards. See *ante*, at 616–617 (reaching same conclusion). I focus my discussion on the collection and testing of blood and urine because those more intrusive procedures better demonstrate the excesses of the FRA's scheme.

properly collected and preserved, and there is no reason to doubt the ability of railroad officials to grasp the relatively simple procedure of obtaining a warrant authorizing, where appropriate, chemical analysis of the extracted fluids. It is therefore wholly unjustified to dispense with the warrant requirement for this final search. See *Chimel* v. *California*, 395 U. S. 752, 761–764 (1969) (exigency exception permits warrantless searches only to the extent that exigency exists).

It is the probable-cause requirement, however, that the FRA's testing regime most egregiously violates, a fact which explains the majority's ready acceptance and expansion of the countertextual "special needs" exception. By any measure, the FRA's highly intrusive collection and testing procedures qualify as full-scale personal searches. Under our precedents, a showing of probable cause is therefore clearly required. But even if these searches were viewed as entailing only minimal intrusions on the order, say, of a police stop-and-frisk, the FRA's program would still fail to pass constitutional muster, for we have, without exception, demanded that even minimally intrusive searches of the person be founded on individualized suspicion. See *supra*, at 638, and n. 1. The federal parties concede it does not satisfy this standard. Brief for Federal Parties 18. Only if one construes the FRA's collection and testing procedures as akin to the routinized and fleeting regulatory interactions which we have permitted in the absence of individualized suspicion, see n. 2, *supra*, might these procedures survive constitutional scrutiny. Presumably for this reason, the majority likens this case to *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976), which upheld brief automobile stops at the border to ascertain the validity of motorists' residence in the United States. *Ante*, at 624. Case law and common sense reveal both the bankruptcy of this absurd analogy and the constitutional imperative of adhering to the textual standard of probable cause to evaluate the FRA's multifarious full-scale searches.

Compelling a person to submit to the piercing of his skin by a hypodermic needle so that his blood may be extracted significantly intrudes on the "personal privacy and dignity against unwarranted intrusion by the State" against which the Fourth Amendment protects. *Schmerber*, *supra*, at 767. As we emphasized in *Terry* v. *Ohio*, 392 U. S. 1, 24–25 (1968), "Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." We have similarly described the taking of a suspect's fingernail scrapings as a "'severe, though brief, intrusion upon cherished personal security.'" *Cupp* v. *Murphy*, 412 U. S. 291, 295 (1973) (quoting *Terry*, *supra*, at 24–25, and upholding this procedure upon a showing of probable cause). The government-compelled withdrawal of blood, involving as it does the added aspect of physical invasion, is surely no less an intrusion. The surrender of blood on demand is, furthermore, hardly a quotidian occurrence. Cf. *Martinez-Fuerte*, *supra*, at 557 (routine stops involve "quite limited" intrusion).

In recognition of the intrusiveness of this procedure, we specifically required in *Schmerber* that police have evidence of a drunken-driving suspect's impairment before forcing him to endure a blood test:

> "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear . . . ." 384 U. S., at 769–770.

Schmerber strongly suggested that the "clear indication" needed to justify a compulsory blood test amounted to a showing of probable cause, which "plainly" existed in that case. *Id.*, at 768. Although subsequent cases interpreting *Schmerber* have differed over whether a showing of individ-

ualized suspicion would have sufficed, compare *Winston*, 470 U. S., at 760 (*Schmerber* "noted the importance of probable cause"), with *Montoya de Hernandez*, 473 U. S., at 540 (*Schmerber* "indicate[d] the necessity for particularized suspicion"), by any reading, *Schmerber* clearly forbade compulsory blood tests on any lesser showing than individualized suspicion. Exactly why a blood test which, if conducted on one person, requires a showing of at least individualized suspicion may, if conducted on many persons, be based on no showing whatsoever, the majority does not—and cannot—explain.[7]

Compelling a person to produce a urine sample on demand also intrudes deeply on privacy and bodily integrity. Urination is among the most private of activities. It is generally forbidden in public, eschewed as a matter of conversation, and performed in places designed to preserve this tradition of

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[7] The majority, seeking to lessen the devastating ramifications of *Schmerber* v. *California*, and to back up its assertion that Government-imposed blood extraction does not "infringe significant privacy interests," *ante*, at 625, emphasizes *Schmerber*'s observation that blood tests are commonplace and can be performed with "'virtually no risk, trauma, or pain.'" *Ante*, at 625, quoting 384 U. S., at 771. The majority, however, wrenches this statement out of context. The *Schmerber* Court made this statement only *after* it established that the blood test fell within the "exigent circumstances" exception to the warrant requirement, *and* that the test was supported by probable cause. Indeed, the statement was made only in the context of the separate inquiry into whether the compulsory blood test was conducted in a reasonable manner. 384 U. S., at 768–772; see also *Winston* v. *Lee*, 470 U. S. 753, 760–761 (1985) ("*Schmerber* recognized that the ordinary requirements of the Fourth Amendment would be the *threshold requirements* for conducting this kind of surgical search and seizure. . . . Beyond these standards, *Schmerber*'s inquiry considered a number of other factors in determining the 'reasonableness' of the blood test") (emphasis added). The majority also cites *South Dakota* v. *Neville*, 459 U. S. 553 (1983), and *Breithaupt* v. *Abram*, 352 U. S. 432 (1957), for the proposition that blood tests are commonplace. *Ante*, at 625. In both those cases, however, the police officers who attempted to impose blood tests on drunken-driving suspects had exceptionally strong evidence of the driver's inebriation. 459 U. S., at 554–556; 352 U. S., at 433.

personal seclusion. Cf. *Martinez-Fuerte*, 428 U. S., at 560 (border-stop questioning involves no more than "some annoyance" and is neither "frightening" nor "offensive"). The FRA, however, gives scant regard to personal privacy, for its Field Manual instructs supervisors monitoring urination that railroad workers must provide urine samples "*under direct observation* by the physician/technician." Federal Railroad Administration, United States Dept. of Transportation, Field Manual: Control of Alcohol and Drug Use in Railroad Operations D–5 (1986) (emphasis added).[8] That the privacy interests offended by compulsory and supervised urine collection are profound is the overwhelming judgment of the lower courts and commentators. As Professor—later Solicitor General—Charles Fried has written:

> "[I]n our culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem." Privacy, 77 Yale L. J. 475, 487 (1968).[9]

The majority's characterization of the privacy interests implicated by urine collection as "minimal," *ante*, at 624, is noth-

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[8] The majority dismisses as nonexistent the intrusiveness of such "direct observation," on the ground that FRA regulations state that such observation is not "require[d]." 50 Fed. Reg. 31555 (1985), cited *ante*, at 626. The majority's dismissal is too hasty, however, for the regulations—in the very same sentence—go on to state: "[B]ut observation is the most effective means of ensuring that the sample is that of the employee and has not been diluted." 50 Fed. Reg. 31555 (1985). Even if this were not the case, the majority's suggestion that officials monitoring urination will disregard the clear commands of the Field Manual with which they are provided is dubious, to say the least.

[9] See, *e. g.*, *National Treasury Employees Union* v. *Von Raab*, 816 F. 2d 170, 175 (CA5 1987), aff'd in pertinent part, *post*, p. 656; *Taylor* v. *O'Grady*, 669 F. Supp. 1422, 1433–1434 (ND Ill. 1987); *Feliciano* v. *Cleveland*, 661 F. Supp. 578, 586 (ND Ohio 1987); *American Federation of Government Employees, AFL–CIO* v. *Weinberger*, 651 F. Supp. 726, 732–733 (SD Ga. 1986); *Capua* v. *Plainfield*, 643 F. Supp. 1507, 1514 (NJ 1986).

ing short of startling. This characterization is, furthermore, belied by the majority's own prior explanation of why compulsory urination constitutes a search for the purposes of the Fourth Amendment:

> "'There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.'" *Ante*, at 617, quoting *National Treasury Employees Union* v. *Von Raab*, 816 F. 2d 170, 175 (CA5 1987).

The fact that the majority can invoke this powerful passage in the context of deciding that a search has occurred, and then ignore it in deciding that the privacy interests this search implicates are "minimal," underscores the shameless manipulability of its balancing approach.

Finally, the chemical analysis the FRA performs upon the blood and urine samples implicates strong privacy interests apart from those intruded upon by the collection of bodily fluids. Technological advances have made it possible to uncover, through analysis of chemical compounds in these fluids, not only drug or alcohol use, but also medical disorders such as epilepsy, diabetes, and clinical depression. Cf. *Martinez-Fuerte*, *supra*, at 558, quoting *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 880 (1975) (checkpoint inquiry involves only "'a brief question or two'" about motorist's residence). As the Court of Appeals for the District of Columbia Circuit has observed: "[S]uch tests may provide Government officials with a periscope through which they can peer into an individual's behavior in her private life, even in her own home." *Jones* v. *McKenzie*, 266 U. S. App. D. C. 85, 89, 833 F. 2d 335, 339 (1987); see also *Capua* v. *Plainfield*, 643 F. Supp. 1507, 1511 (NJ 1986) (urine testing is "form of surveillance" which "reports on a person's off-duty activities just as surely as someone had been present and

watching"). The FRA's requirement that workers disclose the medications they have taken during the 30 days prior to chemical testing further impinges upon the confidentiality customarily attending personal health secrets.

By any reading of our precedents, the intrusiveness of these three searches demands that they—like other full-scale searches—be justified by probable cause. It is no answer to suggest, as does the majority, that railroad workers have relinquished the protection afforded them by this Fourth Amendment requirement, either by "participat[ing] in an industry that is regulated pervasively to ensure safety" or by undergoing periodic fitness tests pursuant to state law or to collective-bargaining agreements. *Ante*, at 627.

Our decisions in the regulatory search area refute the suggestion that the heavy regulation of the railroad industry eclipses workers' rights under the Fourth Amendment to insist upon a showing of probable cause when their bodily fluids are being extracted. This line of cases has exclusively involved searches of employer *property*, with respect to which "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a *proprietor* over the *stock* of such an enterprise." *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 313 (1978) (emphasis added; citation omitted), quoted in *New York* v. *Burger*, 482 U. S. 691, 700 (1987). Never have we intimated that regulatory searches reduce employees' rights of privacy in their *persons*. See *Camara* v. *Municipal Court of San Francisco*, 387 U. S. 523, 537 (1967) ("[T]he inspections are [not] personal in nature"); cf. *Donovan* v. *Dewey*, 452 U. S. 594, 598–599 (1981); *Marshall*, *supra*, at 313. As the Court pointed out in *O'Connor*, individuals do not lose Fourth Amendment rights at the workplace gate, 480 U. S., at 716–718; see also *Oliver* v. *United States*, 466 U. S. 170, 178, n. 8 (1984), any more than they relinquish these rights at the schoolhouse door, *T. L. O.*, 469 U. S., at 333, or the hotel room threshold, *Hoffa* v. *United States*, 385 U. S. 293, 301 (1966). These rights mean

little indeed if, having passed through these portals, an individual may remain subject to a suspicionless search of his person justified solely on the grounds that the government already is permitted to conduct a search of the inanimate contents of the surrounding area. In holding that searches of persons may fall within the category of regulatory searches permitted in the absence of probable cause or even individualized suspicion, the majority sets a dangerous and ill-conceived precedent.

The majority's suggestion that railroad workers' privacy is only minimally invaded by the collection and testing of their bodily fluids because they undergo periodic fitness tests, *ante*, at 624–625, is equally baseless. As an initial matter, even if participation in these fitness tests did render "minimal" an employee's "interest in bodily security," *ante*, at 628, such minimally intrusive searches of the person require, under our precedents, a justificatory showing of individualized suspicion. See *supra*, at 637. More fundamentally, railroad employees are *not* routinely required to submit to blood or urine tests to gain or to maintain employment, and railroad employers do not ordinarily have access to employees' blood or urine, and certainly not for the purpose of ascertaining drug or alcohol usage. That railroad employees sometimes undergo tests of eyesight, hearing, skill, intelligence, and agility, *ante*, at 627, n. 8, hardly prepares them for Government demands to submit to the extraction of blood, to excrete under supervision, or to have these bodily fluids tested for the physiological and psychological secrets they may contain. Surely employees who release basic information about their financial and personal history so that employers may ascertain their "ethical fitness" do not, by so doing, relinquish their expectations of privacy with respect to their personal letters and diaries, revealing though these papers may be of their character.

I recognize that invalidating the full-scale searches involved in the FRA's testing regime for failure to comport with the Fourth Amendment's command of probable cause

may hinder the Government's attempts to make rail transit as safe as humanly possible. But constitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well intentioned, must always be pursued within constitutional boundaries. Were the police freed from the constraints of the Fourth Amendment for just one day to seek out evidence of criminal wrongdoing, the resulting convictions and incarcerations would probably prevent thousands of fatalities. Our refusal to tolerate this specter reflects our shared belief that even beneficent governmental power—whether exercised to save money, save lives, or make the trains run on time—must always yield to "a resolute loyalty to constitutional safeguards." *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 273 (1973). The Constitution demands no less loyalty here.

III

Even accepting the majority's view that the FRA's collection and testing program is appropriately analyzed under a multifactor balancing test, and not under the literal terms of the Fourth Amendment, I would still find the program invalid. The benefits of suspicionless blood and urine testing are far outstripped by the costs imposed on personal liberty by such sweeping searches. Only by erroneously deriding as "minimal" the privacy and dignity interests at stake, and by uncritically inflating the likely efficacy of the FRA's testing program, does the majority strike a different balance.

For the reasons stated above, I find nothing minimal about the intrusion on individual liberty that occurs whenever the Government forcibly draws and analyzes a person's blood and urine. Several aspects of the FRA's testing program exacerbate the intrusiveness of these procedures. Most strikingly, the agency's regulations not only do not forbid, but, in fact, appear to invite criminal prosecutors to obtain the blood and urine samples drawn by the FRA and use them as the basis of criminal investigations and trials. See 49 CFR

§ 219.211(d) (1987) ("Each sample . . . may be made available to . . . a party in litigation upon service of appropriate compulsory process on the custodian of the sample . . ."). This is an unprecedented invitation, leaving open the possibility of criminal prosecutions based on suspicionless searches of the human body. Cf. *Treasury Employees*, *post*, at 666 (Customs Service drug-testing program prohibits use of test results in criminal prosecutions); *Camara*, 387 U. S., at 537.

To be sure, the majority acknowledges, in passing, the possibility of criminal prosecutions, *ante*, at 621, n. 5, but it refuses to factor this possibility into its Fourth Amendment balancing process, stating that "the record does not disclose that [49 CFR § 219.211(d) (1987)] was intended to be, or actually has been, so used." *Ibid.* This demurrer is highly disingenuous. The federal parties concede that they find "no prohibition on the release of FRA testing results to prosecutors." Brief for Federal Parties 10, n. 15. The absence of prosecutions to date—which is likely due to the fact that the FRA's regulations have been held invalid for much of their brief history—hardly proves that prosecutors will not avail themselves of the FRA's invitation in the future. If the majority really views the impact of FRA testing on privacy interests as minimal even if these tests generate criminal prosecutions, it should say so. If the prospect of prosecutions would lead the majority to reassess the validity of the testing program with prosecutions as part of the balance, it should say so, too, or condition its approval of that program on the nonrelease of test results to prosecutors. In ducking this important issue, the majority gravely disserves both the values served by the Fourth Amendment and the rights of those persons whom the FRA searches. Furthermore, the majority's refusal to restrict the release of test results casts considerable doubt on the conceptual basis of its decision—that the "special need" of railway safety is one "beyond the

normal need for law enforcement." *Ante*, at 619 (citations omitted).[10]

The majority also overlooks needlessly intrusive aspects of the testing process itself. Although the FRA requires the collection and testing of both blood and urine, the agency concedes that mandatory urine tests—unlike blood tests—do not measure current impairment and therefore cannot differentiate on-duty impairment from prior drug or alcohol use which has ceased to affect the user's behavior. See 49 CFR § 219.309(2) (1987) (urine test may reveal use of drugs or alcohol as much as 60 days prior to sampling). Given that the FRA's stated goal is to ascertain current impairment, and not to identify persons who have used substances in their spare time sufficiently in advance of their railroad duties to pose no risk of on-duty impairment, § 219.101(a), mandatory urine testing seems wholly excessive. At the very least, the FRA could limit its use of urinalysis to confirming findings of current impairment suggested by a person's blood tests. The additional invasion caused by automatically testing urine as well as blood hardly ensures that privacy interests "will be invaded no more than is necessary." *T. L. O.*, 469 U. S., at 343.

The majority's trivialization of the intrusions on worker privacy posed by the FRA's testing program is matched at the other extreme by its blind acceptance of the Government's assertion that testing will "dete[r] employees engaged in safety-sensitive tasks from using controlled substances or alcohol," and "help railroads obtain invaluable information

[10] As a result of the majority's extension of the regulatory search doctrine to searches of the person, individuals the FRA finds to have used drugs may face criminal prosecution, even if their impairment had nothing to do with causing an accident. The majority observes that evidence of criminal behavior unearthed during an otherwise valid regulatory search is not excludible unless the search is shown to be a "pretext" for obtaining evidence for a criminal trial, *ante*, at 621, n. 5, citing *New York* v. *Burger*, 482 U. S. 691, 716–717, n. 27 (1987)—a defense the majority belittles but, mercifully, preserves for another day.

about the causes of major accidents." *Ante*, at 629, 630. With respect, first, to deterrence, it is simply implausible that testing employees *after* major accidents occur, 49 CFR § 219.201(a)(1) (1987), will appreciably discourage them from using drugs or alcohol. As JUSTICE STEVENS observes in his concurring opinion:

> "Most people—and I would think most railroad employees as well—do not go to work with the expectation that they may be involved in a major accident, particularly one causing such catastrophic results as loss of life or the release of hazardous material requiring an evacuation. Moreover, even if they are conscious of the possibilities that such an accident might occur and that alcohol or drug use might be a contributing factor, if the risk of serious personal injury does not deter their use of these substances, it seems highly unlikely that the additional threat of loss of employment would have any effect on their behavior." *Ante*, at 634.

Under the majority's deterrence rationale, people who skip school or work to spend a sunny day at the zoo will not taunt the lions because their truancy or absenteeism might be discovered in the event they are mauled. It is, of course, the fear of the accident, not the fear of a postaccident revelation, that deters. The majority's credulous acceptance of the FRA's deterrence rationale is made all the more suspect by the agency's failure to introduce, in an otherwise ample administrative record, *any* studies explaining or supporting its theory of accident deterrence.

The poverty of the majority's deterrence rationale leaves the Government's interest in diagnosing the causes of major accidents as the sole remaining justification for the FRA's testing program. I do not denigrate this interest, but it seems a slender thread from which to hang such an intrusive program, particularly given that the knowledge that one or more workers were impaired at the time of an accident falls far short of proving that substance abuse caused or exacer-

bated that accident. See 839 F. 2d 575, 587 (CA9 1988). Some corroborative evidence is needed: witness or co-worker accounts of a worker's misfeasance, or at least indications that the cause of the accident was within a worker's area of responsibility. Such particularized facts are, of course, the very essence of the individualized suspicion requirement which the respondent railroad workers urge, and which the Court of Appeals found to "pos[e] no insuperable burden on the government." *Id.*, at 588. Furthermore, reliance on the importance of diagnosing the causes of an accident as a critical basis for upholding the FRA's testing plan is especially hard to square with our frequent admonition that the interest in ascertaining the causes of a criminal episode does not justify departure from the Fourth Amendment's requirements. "[T]his Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime . . . ." *Katz*, 389 U. S., at 356. Nor should it here.

IV

In his first dissenting opinion as a Member of this Court, Oliver Wendell Holmes observed:

> "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Northern Securities Co.* v. *United States*, 193 U. S. 197, 400–401 (1904).

A majority of this Court, swept away by society's obsession with stopping the scourge of illegal drugs, today succumbs to the popular pressures described by Justice Holmes. In upholding the FRA's plan for blood and urine testing, the

majority bends time-honored and textually based principles of the Fourth Amendment—principles the Framers of the Bill of Rights designed to ensure that the Government has a strong and individualized justification when it seeks to invade an individual's privacy. I believe the Framers would be appalled by the vision of mass governmental intrusions upon the integrity of the human body that the majority allows to become reality. The immediate victims of the majority's constitutional timorousness will be those railroad workers whose bodily fluids the Government may now forcibly collect and analyze. But ultimately, today's decision will reduce the privacy all citizens may enjoy, for, as Justice Holmes understood, principles of law, once bent, do not snap back easily. I dissent.

NATIONAL TREASURY EMPLOYEES UNION ET AL. *v.* VON RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86–1879. Argued November 2, 1988—Decided March 21, 1989

The United States Customs Service, which has as its primary enforcement mission the interdiction and seizure of illegal drugs smuggled into the country, has implemented a drug-screening program requiring urinalysis tests of Service employees seeking transfer or promotion to positions having a direct involvement in drug interdiction or requiring the incumbent to carry firearms or to handle "classified" material. Among other things, the program requires that an applicant be notified that his selection is contingent upon successful completion of drug screening, sets forth procedures for collection and analysis of the requisite samples and procedures designed both to ensure against adulteration or substitution of specimens and to limit the intrusion on employee privacy, and provides that test results may not be turned over to any other agency, including criminal prosecutors, without the employee's written consent. Petitioners, a federal employees' union and one of its officials, filed suit on behalf of Service employees seeking covered positions, alleging that the drug-testing program violated, *inter alia*, the Fourth Amendment. The District Court agreed and enjoined the program. The Court of Appeals vacated the injunction, holding that, although the program effects a search within the meaning of the Fourth Amendment, such searches are reasonable in light of their limited scope and the Service's strong interest in detecting drug use among employees in covered positions.

Held:

1. Where the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment. Cf. *Skinner* v. *Railway Labor Executives' Assn.*, *ante*, at 616–618. However, because the Service's testing program is not designed to serve the ordinary needs of law enforcement—*i. e.*, test results may not be used in a criminal prosecution without the employee's consent, and the purposes of the program are to deter drug use among those eligible for promotion to sensitive positions and to prevent the promotion of drug users to those positions—the public interest in the program must be balanced against

the individual's privacy concerns implicated by the tests to determine whether a warrant, probable cause, or some level of individualized suspicion is required in this particular context. *Railway Labor Executives, ante*, at 619–620. Pp. 665–666.

2. A warrant is not required by the balance of privacy and governmental interests in the context of this case. Such a requirement would serve only to divert valuable agency resources from the Service's primary mission, which would be compromised if warrants were necessary in connection with routine, yet sensitive, employment decisions. Furthermore, a warrant would provide little or no additional protection of personal privacy, since the Service's program defines narrowly and specifically the circumstances justifying testing and the permissible limits of such intrusions; affected employees know that they must be tested, are aware of the testing procedures that the Service must follow, and are not subject to the discretion of officials in the field; and there are no special facts for a neutral magistrate to evaluate, in that implementation of the testing process becomes automatic when an employee pursues a covered position. Pp. 666–667.

3. The Service's testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry firearms, is reasonable despite the absence of a requirement of probable cause or of some level of individualized suspicion. Pp. 667–677.

(a) In light of evidence demonstrating that there is a national crisis in law enforcement caused by the smuggling of illicit narcotics, the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit and have unimpeachable integrity and judgment. It also has a compelling interest in preventing the risk to the life of the citizenry posed by the potential use of deadly force by persons suffering from impaired perception and judgment. These governmental interests outweigh the privacy interests of those seeking promotion to such positions, who have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test by virtue of the special, and obvious, physical and ethical demands of the positions. Pp. 668–672.

(b) Petitioners' contention that the testing program is unreasonable because it is not based on a belief that testing will reveal any drug use by covered employees evinces an unduly narrow view of the context in which the program was implemented. Although it was not motivated by any perceived drug problem among Service employees, the program is nevertheless justified by the extraordinary safety and national security hazards that would attend the promotion of drug users to the sensitive positions in question. Moreover, the mere circumstance that all but a few of the employees tested are innocent does not impugn the pro-

gram's validity, since it is designed to prevent the substantial harm that could be caused by the promotion of drug users as much as it is designed to detect actual drug use. Pp. 673–675.

(c) Also unpersuasive is petitioners' contention that the program is not a sufficiently productive mechanism to justify its intrusion on Fourth Amendment interests because illegal drug users can easily avoid detection by temporary abstinence or by surreptitious adulteration of their urine specimens. Addicts may be unable to abstain even for a limited period or may be unaware of the "fade-away effect" of certain drugs. More importantly, since a particular employee's pattern of elimination for a given drug cannot be predicted with perfect accuracy and may extend for as long as 22 days, and since this information is not likely to be known or available to the employee in any event, he cannot reasonably expect to deceive the test by abstaining after the test date is assigned. Nor can he expect attempts at adulteration to succeed, in view of the precautions built into the program to ensure the integrity of each sample. Pp. 676–677.

4. The record is inadequate for the purpose of determining whether the Service's testing of those who apply for promotion to positions where they would handle "classified" information is reasonable, since it is not clear whether persons occupying particular positions apparently subject to such testing are likely to gain access to sensitive information. On remand, the Court of Appeals should examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric and should, in assessing the reasonableness of requiring tests of those employees, consider pertinent information bearing upon their privacy expectations and the supervision to which they are already subject. Pp. 677–678.

816 F. 2d 170, affirmed in part, vacated in part, and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 679. SCALIA, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 680.

Lois G. Williams argued the cause for petitioners. With her on the briefs was *Elaine D. Kaplan.*

Solicitor General Fried argued the cause for respondent. With him on the brief were *Assistant Attorney General Bolton, Deputy Solicitor General Merrill, Deputy Assistant Attorneys General Spears* and *Cynkar, Lawrence S. Rob-*

bins, Leonard Schaitman, Robert V. Zener, and *James H. Anderson.**

JUSTICE KENNEDY delivered the opinion of the Court.

We granted certiorari to decide whether it violates the Fourth Amendment for the United States Customs Service to require a urinalysis test from employees who seek transfer or promotion to certain positions.

I

A

The United States Customs Service, a bureau of the Department of the Treasury, is the federal agency responsible for processing persons, carriers, cargo, and mail into the United States, collecting revenue from imports, and enforcing customs and related laws. See United States Customs Service, Customs U. S. A., Fiscal Year 1985, p. 4. An important responsibility of the Service is the interdiction and

*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Stephen H. Sachs, Carl Willner, John A. Powell, Steven R. Shapiro, Arthur B. Spitzer,* and *Elizabeth Symonds;* for the American Federation of Labor and Congress of Industrial Organizations et al. by *Joe Goldberg, David Silberman, Laurence Gold, Edward J. Hickey, Jr., Thomas A. Woodley,* and *Richard Kirschner;* for the Coalition of California Utility Workers by *Glenn Rothner;* for the Fraternal Order of Police, Grand Lodge, by *James E. Phillips* and *John R. Fisher;* and for the New Jersey State Lodge, Fraternal Order of Police, by *Jay Rubenstein, Janemary S. Belsole,* and *Stuart Reiser.*

Briefs of *amici curiae* urging affirmance were filed for the California Employment Law Council by *Paul Grossman;* for the College of American Pathologists by *Jack R. Bierig;* for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell, Stephen C. Yohay,* and *Garen E. Dodge;* for Pharmchem Laboratories, Inc., et al. by *Nelson G. Dong;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo, Paul D. Kamenar,* and *Vicki S. Marani.*

Briefs of *amici curiae* were filed for the Chamber of Commerce of the United States of America by *Paul R. Friedman* and *Stephen A. Bokat;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *Anthony T. Caso.*

seizure of contraband, including illegal drugs. *Ibid.* In 1987 alone, Customs agents seized drugs with a retail value of nearly $9 billion. See United States Customs Service, Customs U. S. A., Fiscal Year 1987, p. 40. In the routine discharge of their duties, many Customs employees have direct contact with those who traffic in drugs for profit. Drug import operations, often directed by sophisticated criminal syndicates, *United States* v. *Mendenhall*, 446 U. S. 544, 561–562 (1980) (Powell, J., concurring), may be effected by violence or its threat. As a necessary response, many Customs operatives carry and use firearms in connection with their official duties. App. 109.

In December 1985, respondent, the Commissioner of Customs, established a Drug Screening Task Force to explore the possibility of implementing a drug-screening program within the Service. *Id.*, at 11. After extensive research and consultation with experts in the field, the task force concluded that "drug screening through urinalysis is technologically reliable, valid and accurate." *Ibid.* Citing this conclusion, the Commissioner announced his intention to require drug tests of employees who applied for, or occupied, certain positions within the Service. *Id.*, at 10–11. The Commissioner stated his belief that "Customs is largely drug-free," but noted also that "unfortunately no segment of society is immune from the threat of illegal drug use." *Id.*, at 10. Drug interdiction has become the agency's primary enforcement mission, and the Commissioner stressed that "there is no room in the Customs Service for those who break the laws prohibiting the possession and use of illegal drugs." *Ibid.*

In May 1986, the Commissioner announced implementation of the drug-testing program. Drug tests were made a condition of placement or employment for positions that meet one or more of three criteria. The first is direct involvement in drug interdiction or enforcement of related laws, an activity the Commissioner deemed fraught with obvious dangers to the mission of the agency and the lives of Customs

agents. *Id.*, at 17, 113. The second criterion is a requirement that the incumbent carry firearms, as the Commissioner concluded that "[p]ublic safety demands that employees who carry deadly arms and are prepared to make instant life or death decisions be drug free." *Id.*, at 113. The third criterion is a requirement for the incumbent to handle "classified" material, which the Commissioner determined might fall into the hands of smugglers if accessible to employees who, by reason of their own illegal drug use, are susceptible to bribery or blackmail. *Id.*, at 114.

After an employee qualifies for a position covered by the Customs testing program, the Service advises him by letter that his final selection is contingent upon successful completion of drug screening. An independent contractor contacts the employee to fix the time and place for collecting the sample. On reporting for the test, the employee must produce photographic identification and remove any outer garments, such as a coat or a jacket, and personal belongings. The employee may produce the sample behind a partition, or in the privacy of a bathroom stall if he so chooses. To ensure against adulteration of the specimen, or substitution of a sample from another person, a monitor of the same sex as the employee remains close at hand to listen for the normal sounds of urination. Dye is added to the toilet water to prevent the employee from using the water to adulterate the sample.

Upon receiving the specimen, the monitor inspects it to ensure its proper temperature and color, places a tamper-proof custody seal over the container, and affixes an identification label indicating the date and the individual's specimen number. The employee signs a chain-of-custody form, which is initialed by the monitor, and the urine sample is placed in a plastic bag, sealed, and submitted to a laboratory.[1]

[1] After this case was decided by the Court of Appeals, 816 F. 2d 170 (CA5 1987), the United States Department of Health and Human Services, in accordance with recently enacted legislation, Pub. L. 100–71, § 503, 101

The laboratory tests the sample for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine. Two tests are used. An initial screening test uses the enzyme-multiplied-immunoassay technique (EMIT). Any specimen that is identified as positive on this initial test must then be confirmed using gas chromatography/mass spectrometry (GC/MS). Confirmed positive results are reported to a "Medical Review Officer," "[a] licensed physician . . . who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information." HHS Reg. § 1.2,

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Stat. 468–471, promulgated regulations (hereinafter HHS Regulations or HHS Reg.) governing certain federal employee drug-testing programs. 53 Fed. Reg. 11979 (1988). To the extent the HHS Regulations add to, or depart from, the procedures adopted as part of a federal drug-screening program covered by Pub. L. 100–71, the HHS Regulations control. Pub. L. 100–71, § 503(b)(2)(B), 101 Stat. 470. Both parties agree that the Customs Service's drug-testing program must conform to the HHS Regulations. See Brief for Petitioners 6, n. 8; Brief for Respondent 4–5, and n. 4. We therefore consider the HHS Regulations to the extent they supplement or displace the Commissioner's original directive. See *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 53 (1974); *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 281–282 (1969).

One respect in which the original Customs directive differs from the now-prevailing regime concerns the extent to which the employee may be required to disclose personal medical information. Under the Service's original plan, each tested employee was asked to disclose, at the time the urine sample was collected, any medications taken within the last 30 days, and to explain any circumstances under which he may have been in legitimate contact with illegal substances within the last 30 days. Failure to provide this information at this time could result in the agency not considering the effect of medications or other licit contacts with drugs on a positive test result. Under the HHS Regulations, an employee need not provide information concerning medications when he produces the sample for testing. He may instead present such information only after he is notified that his specimen tested positive for illicit drugs, at which time the Medical Review Officer reviews all records made available by the employee to determine whether the positive indication could have been caused by lawful use of drugs. See HHS Reg. § 2.7, 53 Fed. Reg. 11985–11986 (1988).

53 Fed. Reg. 11980 (1988); HHS Reg. § 2.4(g), 53 Fed. Reg., at 11983. After verifying the positive result, the Medical Review Officer transmits it to the agency.

Customs employees who test positive for drugs and who can offer no satisfactory explanation are subject to dismissal from the Service. Test results may not, however, be turned over to any other agency, including criminal prosecutors, without the employee's written consent.

B

Petitioners, a union of federal employees and a union official, commenced this suit in the United States District Court for the Eastern District of Louisiana on behalf of current Customs Service employees who seek covered positions. Petitioners alleged that the Custom Service drug-testing program violated, *inter alia*, the Fourth Amendment. The District Court agreed. 649 F. Supp. 380 (1986). The court acknowledged "the legitimate governmental interest in a drug-free work place and work force," but concluded that "the drug testing plan constitutes an overly intrusive policy of searches and seizures without probable cause or reasonable suspicion, in violation of legitimate expectations of privacy." *Id.*, at 387. The court enjoined the drug-testing program, and ordered the Customs Service not to require drug tests of any applicants for covered positions.

A divided panel of the United States Court of Appeals for the Fifth Circuit vacated the injunction. 816 F. 2d 170 (1987). The court agreed with petitioners that the drug-screening program, by requiring an employee to produce a urine sample for chemical testing, effects a search within the meaning of the Fourth Amendment. The court held further that the searches required by the Commissioner's directive are reasonable under the Fourth Amendment. It first noted that "[t]he Service has attempted to minimize the intrusiveness of the search" by not requiring visual observation of the act of urination and by affording notice to the employee that

he will be tested. *Id.*, at 177. The court also considered it significant that the program limits discretion in determining which employees are to be tested, *ibid.*, and noted that the tests are an aspect of the employment relationship, *id.*, at 178.

The court further found that the Government has a strong interest in detecting drug use among employees who meet the criteria of the Customs program. It reasoned that drug use by covered employees casts substantial doubt on their ability to discharge their duties honestly and vigorously, undermining public confidence in the integrity of the Service and concomitantly impairing the Service's efforts to enforce the drug laws. *Ibid.* Illicit drug users, the court found, are susceptible to bribery and blackmail, may be tempted to divert for their own use portions of any drug shipments they interdict, and may, if required to carry firearms, "endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use." *Ibid.* "Considering the nature and responsibilities of the jobs for which applicants are being considered at Customs and the limited scope of the search," the court stated, "the exaction of consent as a condition of assignment to the new job is not unreasonable." *Id.*, at 179.

The dissenting judge concluded that the Customs program is not an effective method for achieving the Service's goals. He argued principally that an employee "given a five day notification of a test date need only abstain from drug use to prevent being identified as a user." *Id.*, at 184. He noted also that persons already employed in sensitive positions are not subject to the test. *Ibid.* Because he did not believe the Customs program can achieve its purposes, the dissenting judge found it unreasonable under the Fourth Amendment.

We granted certiorari. 485 U. S. 903 (1988). We now affirm so much of the judgment of the Court of Appeals as upheld the testing of employees directly involved in drug interdiction or required to carry firearms. We vacate the

judgment to the extent it upheld the testing of applicants for positions requiring the incumbent to handle classified materials, and remand for further proceedings.

II

In *Skinner* v. *Railway Labor Executives' Assn.*, *ante*, at 616–618, decided today, we held that federal regulations requiring employees of private railroads to produce urine samples for chemical testing implicate the Fourth Amendment, as those tests invade reasonable expectations of privacy. Our earlier cases have settled that the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer, *O'Connor* v. *Ortega*, 480 U. S. 709, 717 (1987) (plurality opinion); see *id.*, at 731 (SCALIA, J., concurring in judgment), and, in view of our holding in *Railway Labor Executives* that urine tests are searches, it follows that the Customs Service's drug-testing program must meet the reasonableness requirement of the Fourth Amendment.

While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, see, *e. g.*, *Griffin* v. *Wisconsin*, 483 U. S. 868, 873 (1987); *United States* v. *Karo*, 468 U. S. 705, 717 (1984), our decision in *Railway Labor Executives* reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. *Ante*, at 618–624. See also *New Jersey* v. *T. L. O.*, 469 U. S. 325, 342, n. 8 (1985); *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 556–661 (1976). As we note in *Railway Labor Executives*, our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or

some level of individualized suspicion in the particular context. *Ante*, at 619–620.

It is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent. The purposes of the program are to deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions. These substantial interests, no less than the Government's concern for safe rail transportation at issue in *Railway Labor Executives*, present a special need that may justify departure from the ordinary warrant and probable-cause requirements.

A

Petitioners do not contend that a warrant is required by the balance of privacy and governmental interests in this context, nor could any such contention withstand scrutiny. We have recognized before that requiring the Government to procure a warrant for every work-related intrusion "would conflict with 'the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *O'Connor* v. *Ortega*, *supra*, at 722, quoting *Connick* v. *Myers*, 461 U. S. 138, 143 (1983). See also 480 U. S., at 732 (SCALIA, J., concurring in judgment); *New Jersey* v. *T. L. O.*, *supra*, at 340 (noting that "[t]he warrant requirement . . . is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools"). Even if Customs Service employees are more likely to be familiar with the procedures required to obtain a warrant than most other Government workers, requiring a warrant in this context would serve only to divert valuable agency resources from the Service's primary mis-

sion. The Customs Service has been entrusted with pressing responsibilities, and its mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions.

Furthermore, a warrant would provide little or nothing in the way of additional protection of personal privacy. A warrant serves primarily to advise the citizen that an intrusion is authorized by law and limited in its permissible scope and to interpose a neutral magistrate between the citizen and the law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). But in the present context, "the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically . . . , and doubtless are well known to covered employees." *Ante*, at 622. Under the Customs program, every employee who seeks a transfer to a covered position knows that he must take a drug test, and is likewise aware of the procedures the Service must follow in administering the test. A covered employee is simply not subject "to the discretion of the official in the field." *Camara* v. *Municipal Court of San Francisco*, 387 U. S. 523, 532 (1967). The process becomes automatic when the employee elects to apply for, and thereafter pursue, a covered position. Because the Service does not make a discretionary determination to search based on a judgment that certain conditions are present, there are simply "no special facts for a neutral magistrate to evaluate." *South Dakota* v. *Opperman*, 428 U. S. 364, 383 (1976) (Powell, J., concurring).

B

Even where it is reasonable to dispense with the warrant requirement in the particular circumstances, a search ordinarily must be based on probable cause. *Ante*, at 624. Our cases teach, however, that the probable-cause standard "'is peculiarly related to criminal investigations.'" *Colorado* v. *Bertine*, 479 U. S. 367, 371 (1987), quoting *South Dakota* v.

Opperman, *supra*, at 370, n. 5. In particular, the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, *Colorado* v. *Bertine*, *supra*, at 371; see also *O'Connor* v. *Ortega*, 480 U. S., at 723, especially where the Government seeks to *prevent* the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person. Cf. *Camara* v. *Municipal Court of San Francisco*, *supra*, at 535–536 (noting that building code inspections, unlike searches conducted pursuant to a criminal investigation, are designed "to prevent even the unintentional development of conditions which are hazardous to public health and safety"); *United States* v. *Martinez-Fuerte*, 428 U. S., at 557 (noting that requiring particularized suspicion before routine stops on major highways near the Mexican border "would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens"). Our precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. *E. g.*, *ante*, at 624. We think the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms.

The Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population. We have adverted before to "the veritable national crisis in law enforcement caused by smuggling of illicit narcotics." *United States* v. *Montoya de Hernandez*, 473 U. S. 531, 538 (1985). See also *Florida* v. *Royer*, 460 U. S. 491, 513 (BLACKMUN, J., dissenting). Our

cases also reflect the traffickers' seemingly inexhaustible repertoire of deceptive practices and elaborate schemes for importing narcotics, *e. g.*, *United States* v. *Montoya de Hernandez*, *supra*, at 538–539; *United States* v. *Ramsey*, 431 U. S. 606, 608–609 (1977). The record in this case confirms that, through the adroit selection of source locations, smuggling routes, and increasingly elaborate methods of concealment, drug traffickers have managed to bring into this country increasingly large quantities of illegal drugs. App. 111. The record also indicates, and it is well known, that drug smugglers do not hesitate to use violence to protect their lucrative trade and avoid apprehension. *Id.*, at 109.

Many of the Service's employees are often exposed to this criminal element and to the controlled substances it seeks to smuggle into the country. *Ibid.* Cf. *United States* v. *Montoya de Hernandez*, *supra*, at 543. The physical safety of these employees may be threatened, and many may be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service. The Commissioner indicated below that "Customs [o]fficers have been shot, stabbed, run over, dragged by automobiles, and assaulted with blunt objects while performing their duties." App. at 109–110. At least nine officers have died in the line of duty since 1974. He also noted that Customs officers have been the targets of bribery by drug smugglers on numerous occasions, and several have been removed from the Service for accepting bribes and for other integrity violations. *Id.*, at 114. See also United States Customs Service, Customs U. S. A., Fiscal Year 1987, p. 31 (reporting internal investigations that resulted in the arrest of 24 employees and 54 civilians); United States Customs Service, Customs U. S. A., Fiscal Year 1986, p. 32 (reporting that 334 criminal and serious integrity investigations were conducted during the fiscal year, resulting in the arrest of 37 employees and 17 civilians); United States Customs Service, Customs

U. S. A., Fiscal Year 1985, p. 32 (reporting that 284 criminal and serious integrity investigations were conducted during the 1985 fiscal year, resulting in the arrest of 15 employees and 51 civilians).

It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment. Indeed, the Government's interest here is at least as important as its interest in searching travelers entering the country. We have long held that travelers seeking to enter the country may be stopped and required to submit to a routine search without probable cause, or even founded suspicion, "because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll* v. *United States*, 267 U. S. 132, 154 (1925). See also *United States* v. *Montoya de Hernandez*, *supra*, at 538; *United States* v. *Ramsey*, *supra*, at 617–619. This national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics. A drug user's indifference to the Service's basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals. The public interest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs.

The public interest likewise demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm, even if the incumbent is not engaged directly in the interdiction of drugs. Customs employees who may use deadly force plainly "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Ante*, at 628. We agree with the Government

that the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force. Indeed, ensuring against the creation of this dangerous risk will itself further Fourth Amendment values, as the use of deadly force may violate the Fourth Amendment in certain circumstances. See *Tennessee* v. *Garner*, 471 U. S. 1, 7–12 (1985).

Against these valid public interests we must weigh the interference with individual liberty that results from requiring these classes of employees to undergo a urine test. The interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances. *Ante*, at 626. We have recognized, however, that the "operational realities of the workplace" may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts. See *O'Connor* v. *Ortega*, 480 U. S., at 717; *id.*, at 732 (SCALIA, J., concurring in judgment). While these operational realities will rarely affect an employee's expectations of privacy with respect to searches of his person, or of personal effects that the employee may bring to the workplace, *id.*, at 716, 725, it is plain that certain forms of public employment may diminish privacy expectations even with respect to such personal searches. Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day. Similarly, those who join our military or intelligence services may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions. Cf. *Snepp* v. *United States*, 444 U. S. 507, 509, n. 3 (1980); *Parker* v. *Levy*, 417 U. S. 733, 758 (1974); *Committee for GI Rights* v.

Callaway, 171 U. S. App. D. C. 73, 84, 518 F. 2d 466, 477 (1975).

We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness. Cf. *In re Caruso* v. *Ward*, 72 N. Y. 2d 433, 441, 530 N. E. 2d 850, 854–855 (1988). While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders.[2]

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[2]The procedures prescribed by the Customs Service for the collection and analysis of the requisite samples do not carry the grave potential for "arbitrary and oppressive interference with the privacy and personal security of individuals," *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 554, (1976), that the Fourth Amendment was designed to prevent. Indeed, these procedures significantly minimize the program's intrusion on privacy interests. Only employees who have been tentatively accepted for promotion or transfer to one of the three categories of covered positions are tested, and applicants know at the outset that a drug test is a requirement of those positions. Employees are also notified in advance of the scheduled sample collection, thus reducing to a minimum any "unsettling show of authority," *Delaware* v. *Prouse*, 440 U. S. 648, 657 (1979), that may be associated with unexpected intrusions on privacy. Cf. *United States* v. *Martinez-Fuerte*, *supra*, at 559 (noting that the intrusion on privacy occasioned by routine highway checkpoints is minimized by the fact that motorists "are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere"); *Wyman* v. *James*, 400 U. S. 309, 320–321 (1971) (providing a welfare re-

Without disparaging the importance of the governmental interests that support the suspicionless searches of these employees, petitioners nevertheless contend that the Service's drug-testing program is unreasonable in two particulars. First, petitioners argue that the program is unjustified because it is not based on a belief that testing will reveal any drug use by covered employees. In pressing this argument, petitioners point out that the Service's testing scheme was not implemented in response to any perceived drug problem among Customs employees, and that the program actually has not led to the discovery of a significant number of drug users. Brief for Petitioners 37, 44; Tr. of Oral Arg. 11–12, 20–21. Counsel for petitioners informed us at oral argument that no more than 5 employees out of 3,600 have tested positive for drugs. *Id.*, at 11. Second, petitioners contend that the Service's scheme is not a "sufficiently productive mechanism to justify [its] intrusion upon Fourth Amendment interests," *Delaware* v. *Prouse*, 440 U. S. 648, 658–659 (1979), because illegal drug users can avoid detection with ease by temporary abstinence or by surreptitious adulteration of their urine specimens. Brief for Petitioners 46–47. These contentions are unpersuasive.

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cipient with advance notice that she would be visited by a welfare caseworker minimized the intrusion on privacy occasioned by the visit). There is no direct observation of the act of urination, as the employee may provide a specimen in the privacy of a stall.

Further, urine samples may be examined only for the specified drugs. The use of samples to test for any other substances is prohibited. See HHS Reg. § 2.1(c), 53 Fed. Reg. 11980 (1988). And, as the Court of Appeals noted, the combination of EMIT and GC/MS tests required by the Service is highly accurate, assuming proper storage, handling, and measurement techniques. 816 F. 2d, at 181. Finally, an employee need not disclose personal medical information to the Government unless his test result is positive, and even then any such information is reported to a licensed physician. Taken together, these procedures significantly minimize the intrusiveness of the Service's drug-screening program.

Petitioners' first contention evinces an unduly narrow view of the context in which the Service's testing program was implemented. Petitioners do not dispute, nor can there be doubt, that drug abuse is one of the most serious problems confronting our society today. There is little reason to believe that American workplaces are immune from this pervasive social problem, as is amply illustrated by our decision in *Railway Labor Executives*. See also *Masino* v. *United States*, 589 F. 2d 1048, 1050 (Ct. Cl. 1978) (describing marijuana use by two Customs inspectors). Detecting drug impairment on the part of employees can be a difficult task, especially where, as here, it is not feasible to subject employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments. Indeed, the almost unique mission of the Service gives the Government a compelling interest in ensuring that many of these covered employees do not use drugs even off duty, for such use creates risks of bribery and blackmail against which the Government is entitled to guard. In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service's policy of deterring drug users from seeking such promotions cannot be deemed unreasonable.

The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. The same is likely to be true of householders who are required to submit to suspicionless housing code inspections, see *Camara* v. *Municipal Court of San Francisco*, 387 U. S. 523 (1967), and of motorists who are stopped at the checkpoints we approved in *United States* v. *Martinez-Fuerte*, 428 U. S. 543 (1976). The Service's program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect those employees who use drugs. Where, as here, the possible harm against which the Government seeks to guard is

substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.[3]

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[3] The point is well illustrated also by the Federal Government's practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive. Applying our precedents dealing with administrative searches, see, *e. g.*, *Camara* v. *Municipal Court of San Francisco*, 387 U. S. 523 (1967), the lower courts that have considered the question have consistently concluded that such searches are reasonable under the Fourth Amendment. As Judge Friendly explained in a leading case upholding such searches:

"When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air." *United States* v. *Edwards*, 498 F. 2d 496, 500 (CA2 1974) (emphasis in original).

See also *United States* v. *Skipwith*, 482 F. 2d 1272, 1275–1276 (CA5 1973); *United States* v. *Davis*, 482 F. 2d 893, 907–912 (CA9 1973). It is true, as counsel for petitioners pointed out at oral argument, that these air piracy precautions were adopted in response to an observable national and international hijacking crisis. Tr. of Oral Arg. 13. Yet we would not suppose that, if the validity of these searches be conceded, the Government would be precluded from conducting them absent a demonstration of danger as to any particular airport or airline. It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.

Nor would we think, in view of the obvious deterrent purpose of these searches, that the validity of the Government's airport screening program necessarily turns on whether significant numbers of putative air pirates are actually discovered by the searches conducted under the program. In the 15 years the program has been in effect, more than 9.5 *billion* persons have been screened, and over 10 *billion* pieces of luggage have been inspected. See Federal Aviation Administration, Semiannual Report to Congress on the Effectiveness of The Civil Aviation Program (Nov. 1988) (Exhibit 6). By far the overwhelming majority of those persons who have been searched, like Customs employees who have been tested under the Service's drug-screening scheme, have proved entirely innocent—only

We think petitioners' second argument—that the Service's testing program is ineffective because employees may attempt to deceive the test by a brief abstention before the test date, or by adulterating their urine specimens—overstates the case. As the Court of Appeals noted, addicts may be unable to abstain even for a limited period of time, or may be unaware of the "fade-away effect" of certain drugs. 816 F. 2d, at 180. More importantly, the avoidance techniques suggested by petitioners are fraught with uncertainty and risks for those employees who venture to attempt them. A particular employee's pattern of elimination for a given drug cannot be predicted with perfect accuracy, and, in any event, this information is not likely to be known or available to the employee. Petitioners' own expert indicated below that the time it takes for particular drugs to become undetectable in urine can vary widely depending on the individual, and may extend for as long as 22 days. App. 66. See also *ante*, at 631 (noting Court of Appeals' reliance on certain academic literature that indicates that the testing of urine can discover drug use "'for . . . weeks after the ingestion of the drug'"). Thus, contrary to petitioners' suggestion, no employee reasonably can expect to deceive the test by the simple expedient of abstaining after the test date is assigned. Nor can he expect attempts at adulteration to succeed, in view of the precautions taken by the sample collector to ensure the integrity of the sample. In all the circumstances, we are persuaded that the program bears a close and substantial relation to the Service's goal of deterring drug users from seeking promotion to sensitive positions.[4]

42,000 firearms have been detected during the same period. *Ibid.* When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success. See *Bell* v. *Wolfish*, 441 U. S. 520, 559 (1979).

[4] Indeed, petitioners' objection is based on those features of the Service's program—the provision of advance notice and the failure of the sample collector to observe directly the act of urination—that contribute sig-

In sum, we believe the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm. We hold that the testing of these employees is reasonable under the Fourth Amendment.

C

We are unable, on the present record, to assess the reasonableness of the Government's testing program insofar as it covers employees who are required "to handle classified material." App. 17. We readily agree that the Government has a compelling interest in protecting truly sensitive information from those who, "under compulsion of circumstances or for other reasons, . . . might compromise [such] information." *Department of Navy* v. *Egan*, 484 U. S. 518, 528 (1988). See also *United States* v. *Robel*, 389 U. S. 258, 267 (1967) ("We have recognized that, while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests. . . . The Government can deny access to its secrets to those who would use such information to harm the Nation"). We also agree that employees who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test under the Service's screening program, especially if the positions covered under this category require background investigations, medical examinations, or other intrusions that may be expected to diminish their expectations of privacy in respect of a urinalysis test. Cf. *Department of Navy* v. *Egan*, *supra*, at 528 (noting that the Executive Branch generally subjects those desir-

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nificantly to diminish the program's intrusion on privacy. See *supra*, at 672–673, n. 2. Thus, under petitioners' view, "the testing program would be more likely to be constitutional if it were more pervasive and more invasive of privacy." 816 F. 2d, at 180.

ing a security clearance to "a background investigation that varies according to the degree of adverse effect the applicant could have on the national security").

It is not clear, however, whether the category defined by the Service's testing directive encompasses only those Customs employees likely to gain access to sensitive information. Employees who are tested under the Service's scheme include those holding such diverse positions as "Accountant," "Accounting Technician," "Animal Caretaker," "Attorney (All)," "Baggage Clerk," "Co-op Student (All)," "Electric Equipment Repairer," "Mail Clerk/Assistant," and "Messenger." App. 42–43. We assume these positions were selected for coverage under the Service's testing program by reason of the incumbent's access to "classified" information, as it is not clear that they would fall under either of the two categories we have already considered. Yet it is not evident that those occupying these positions are likely to gain access to sensitive information, and this apparent discrepancy raises in our minds the question whether the Service has defined this category of employees more broadly than is necessary to meet the purposes of the Commissioner's directive.

We cannot resolve this ambiguity on the basis of the record before us, and we think it is appropriate to remand the case to the Court of Appeals for such proceedings as may be necessary to clarify the scope of this category of employees subject to testing. Upon remand the Court of Appeals should examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric. In assessing the reasonableness of requiring tests of these employees, the court should also consider pertinent information bearing upon the employees' privacy expectations, as well as the supervision to which these employees are already subject.

III

Where the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug

use, the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment. Because the testing program adopted by the Customs Service is not designed to serve the ordinary needs of law enforcement, we have balanced the public interest in the Service's testing program against the privacy concerns implicated by the tests, without reference to our usual presumption in favor of the procedures specified in the Warrant Clause, to assess whether the tests required by Customs are reasonable.

We hold that the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable. The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions. We do not decide whether testing those who apply for promotion to positions where they would handle "classified" information is reasonable because we find the record inadequate for this purpose.

The judgment of the Court of Appeals for the Fifth Circuit is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

For the reasons stated in my dissenting opinion in *Skinner* v. *Railway Labor Executives' Assn.*, *ante*, p. 635, I also dissent from the Court's decision in this case. Here, as in *Skinner*, the Court's abandonment of the Fourth Amendment's express requirement that searches of the person rest on

probable cause is unprincipled and unjustifiable. But even if I believed that balancing analysis was appropriate under the Fourth Amendment, I would still dissent from today's judgment for the reasons stated by JUSTICE SCALIA in his dissenting opinion, *post* this page, and for the reasons noted by the dissenting judge below relating to the inadequate tailoring of the Customs Service's drug-testing plan. See 816 F. 2d 170, 182–184 (CA5 1987) (Hill, J.).

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, dissenting.

The issue in this case is not whether Customs Service employees can constitutionally be denied promotion, or even dismissed, for a single instance of unlawful drug use, at home or at work. They assuredly can. The issue here is what steps can constitutionally be taken to *detect* such drug use. The Government asserts it can demand that employees perform "an excretory function traditionally shielded by great privacy," *Skinner* v. *Railway Labor Executives' Assn.*, *ante*, at 626, while "a monitor of the same sex . . . remains close at hand to listen for the normal sounds," *ante*, at 661, and that the excretion thus produced be turned over to the Government for chemical analysis. The Court agrees that this constitutes a search for purposes of the Fourth Amendment—and I think it obvious that it is a type of search particularly destructive of privacy and offensive to personal dignity.

Until today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment. See *Bell* v. *Wolfish*, 441 U. S. 520, 558–560 (1979). Today, in *Skinner*, we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court's opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society.

I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." While there are some absolutes in Fourth Amendment law, as soon as those have been left behind and the question comes down to whether a particular search has been "reasonable," the answer depends largely upon the social necessity that prompts the search. Thus, in upholding the administrative search of a student's purse in a school, we began with the observation (documented by an agency report to Congress) that "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *New Jersey* v. *T. L. O.*, 469 U. S. 325, 339 (1985). When we approved fixed checkpoints near the Mexican border to stop and search cars for illegal aliens, we observed at the outset that "the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country," and that "[i]nterdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 551–552 (1976). And the substantive analysis of our opinion today in *Skinner* begins, "[t]he problem of alcohol use on American railroads is as old as the industry itself," and goes on to cite statistics concerning that problem and the accidents it causes, including a 1979 study finding that "23% of the operating personnel were 'problem drinkers.'" *Skinner*, *ante*, at 606, and 607, n. 1.

The Court's opinion in the present case, however, will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees.

Instead, there are assurances that "[t]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population," *ante*, at 668; that "[m]any of the Service's employees are often exposed to [drug smugglers] and to the controlled substances [they seek] to smuggle into the country," *ante*, at 669; that "Customs officers have been the targets of bribery by drug smugglers on numerous occasions, and several have been removed from the Service for accepting bribes and other integrity violations," *ibid.;* that "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment," *ante*, at 670; that the "national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics," *ibid.;* and that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force," *ante*, at 671. To paraphrase Churchill, all this contains much that is obviously true, and much that is relevant; unfortunately, what is obviously true is not relevant, and what is relevant is not obviously true. The only pertinent points, it seems to me, are supported by nothing but speculation, and not very plausible speculation at that. It is not apparent to me that a Customs Service employee who uses drugs is significantly more likely to be bribed by a drug smuggler, any more than a Customs Service employee who wears diamonds is significantly more likely to be bribed by a diamond smuggler—unless, perhaps, the addiction to drugs is so severe, and requires so much money to maintain, that it would be detectable even without benefit of a urine test. Nor is it apparent to me that Customs officers who use drugs will be appreciably less "sympathetic" to their drug-interdiction mission, any more than police officers who exceed the speed limit in their private cars are appreciably less

sympathetic to their mission of enforcing the traffic laws. (The only difference is that the Customs officer's individual efforts, if they are irreplaceable, can theoretically affect the availability of his own drug supply—a prospect so remote as to be an absurd basis of motivation.) Nor, finally, is it apparent to me that urine tests will be even marginally more effective in preventing gun-carrying agents from risking "impaired perception and judgment" than is their current knowledge that, if impaired, they may be shot dead in unequal combat with unimpaired smugglers—unless, again, their addiction is so severe that no urine test is needed for detection.

What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of *even a single instance* in which any of the speculated horribles actually occurred: an instance, that is, in which the cause of bribetaking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use. Although the Court points out that several employees have in the past been removed from the Service for accepting bribes and other integrity violations, and that at least nine officers have died in the line of duty since 1974, *ante*, at 669, there is no indication whatever that these incidents were related to drug use by Service employees. Perhaps concrete evidence of the severity of a problem is unnecessary when it is so well known that courts can almost take judicial notice of it; but that is surely not the case here. The Commissioner of Customs himself has stated that he "believe[s] that Customs is largely drug-free," that "[t]he extent of illegal drug use by Customs employees was not the reason for establishing this program," and that he "hope[s] and expect[s] to receive reports of very few positive findings through drug screening." App. 10, 15. The test results have fulfilled those hopes and expectations. According to the Service's counsel, out of 3,600 employees

tested, no more than 5 tested positive for drugs. See *ante*, at 673.

The Court's response to this lack of evidence is that "[t]here is little reason to believe that American workplaces are immune from [the] pervasive social problem" of drug abuse. *Ante*, at 674. Perhaps such a generalization would suffice if the workplace at issue could produce such catastrophic social harm that no risk whatever is tolerable—the secured areas of a nuclear power plant, for example, see *Rushton* v. *Nebraska Public Power District*, 844 F. 2d 562 (CA8 1988). But if such a generalization suffices to justify demeaning bodily searches, without particularized suspicion, to guard against the bribing or blackmailing of a law enforcement agent, or the careless use of a firearm, then the Fourth Amendment has become frail protection indeed. In *Skinner*, *Bell*, *T. L. O.*, and *Martinez-Fuerte*, we took pains to establish the existence of special need for the search or seizure—a need based not upon the existence of a "pervasive social problem" combined with speculation as to the effect of that problem in the field at issue, but rather upon well-known or well-demonstrated evils *in that field*, with well-known or well-demonstrated consequences. In *Skinner*, for example, we pointed to a long history of alcohol abuse in the railroad industry, and noted that in an 8-year period 45 train accidents and incidents had occurred because of alcohol- and drug-impaired railroad employees, killing 34 people, injuring 66, and causing more than $28 million in property damage. *Ante*, at 608. In the present case, by contrast, not only is the Customs Service thought to be "largely drug-free," but the connection between whatever drug use may exist and serious social harm is entirely speculative. Except for the fact that the search of a person is much more intrusive than the stop of a car, the present case resembles *Delaware* v. *Prouse*, 440 U. S. 648 (1979), where we held that the Fourth Amendment prohibited random stops to check drivers' licenses and motor vehicle registrations. The contribution of this practice to highway

safety, we concluded, was "marginal at best" since the number of licensed drivers that must be stopped in order to find one unlicensed one "will be large indeed." *Id.*, at 660.

Today's decision would be wrong, but at least of more limited effect, if its approval of drug testing were confined to that category of employees assigned specifically to drug interdiction duties. Relatively few public employees fit that description. But in extending approval of drug testing to that category consisting of employees who carry firearms, the Court exposes vast numbers of public employees to this needless indignity. Logically, of course, if those who carry guns can be treated in this fashion, so can all others whose work, if performed under the influence of drugs, may endanger others—automobile drivers, operators of other potentially dangerous equipment, construction workers, school crossing guards. A similarly broad scope attaches to the Court's approval of drug testing for those with access to "sensitive information."[1] Since this category is not limited to

[1] The Court apparently approves application of the urine tests to personnel receiving access to "sensitive information." *Ante*, at 677. Since, however, it is unsure whether "classified material" is "sensitive information," it remands with instructions that the Court of Appeals "examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric." *Ante*, at 678. I am not sure what these instructions mean. Surely the person who classifies information *always* considers it "sensitive" in some sense—and the Court does not indicate what particular sort of sensitivity is crucial. Moreover, it seems to me most unlikely that "the criteria used by the Service in determining what materials are classified" are any different from those prescribed by the President in his Executive Order on the subject, see Exec. Order No. 12356, 3 CFR 166 (1982 Comp.)—and if there is a difference it is probably unlawful, see § 5.4(b)(2), *id.*, at 177. In any case, whatever idiosyncratic standards for classification the Customs Service might have would seem to be irrelevant, inasmuch as the rule at issue here is not limited to material classified *by the Customs Service*, but includes (and may well apply principally to) material classified elsewhere in the Government—for example, in the Federal Bureau of Investigation, the Drug Enforcement Administration, or the State Department—and conveyed to the Service. See App. 24–25.

Service employees with drug interdiction duties, nor to "sensitive information" specifically relating to drug traffic, today's holding apparently approves drug testing for all federal employees with security clearances—or, indeed, for all federal employees with valuable confidential information to impart. Since drug use is not a particular problem in the Customs Service, employees throughout the Government are no less likely to violate the public trust by taking bribes to feed their drug habit, or by yielding to blackmail. Moreover, there is no reason why this super-protection against harms arising from drug use must be limited to public employees; a law requiring similar testing of private citizens who use dangerous instruments such as guns or cars, or who have access to classified information, would also be constitutional.

There is only one apparent basis that sets the testing at issue here apart from all these other situations—but it is not a basis upon which the Court is willing to rely. I do not believe for a minute that the driving force behind these drug-testing rules was any of the feeble justifications put forward by counsel here and accepted by the Court. The only plausible explanation, in my view, is what the Commissioner himself offered in the concluding sentence of his memorandum to Customs Service employees announcing the program: "Implementation of the drug screening program would set an important example in our country's struggle with this most serious threat to our national health and security." App. 12. Or as respondent's brief to this Court asserted: "[I]f a law enforcement agency and its employees do not take the law seriously, neither will the public on which the agency's effectiveness depends." Brief for Respondent 36. What better way to show that the Government is serious about its "war on drugs" than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity? To be sure, there is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, but it will show to the world that the

Service is "clean," and—most important of all—will demonstrate the determination of the Government to eliminate this scourge of our society! I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.

There is irony in the Government's citation, in support of its position, of Justice Brandeis' statement in *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) that "[f]or good or for ill, [our Government] teaches the whole people by its example." Brief for Respondent 36. Brandeis was there *dissenting* from the Court's admission of evidence obtained through an unlawful Government wiretap. He was not praising the Government's example of vigor and enthusiasm in combatting crime, but condemning its example that "the end justifies the means," 277 U. S., at 485. An even more apt quotation from that famous Brandeis dissent would have been the following:

> "[I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Id.*, at 479.

Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

BOARD OF ESTIMATE OF CITY OF NEW YORK ET AL. *v.* MORRIS ET AL.

APPEAL FROM UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 87–1022. Argued December 7, 1988—Decided March 22, 1989*

New York City's Board of Estimate consists of the mayor and two other members elected citywide, each of whom casts two votes, plus the elected presidents of the city's five boroughs, each of whom casts one vote. Appellees, residents and voters of Brooklyn, the most populous borough, charging that the city charter's sections governing the board's composition are inconsistent with the Equal Protection Clause of the Fourteenth Amendment, brought suit in the District Court, which concluded that the board was a nonelective, nonlegislative body not subject to the rule established by *Reynolds* v. *Sims*, 377 U. S. 533, and other reapportionment cases. The Court of Appeals reversed, finding that the board's selection process must comply with the reapportionment cases' so-called "one-person, one-vote" requirement, since its members ultimately are chosen by popular vote. On remand, the District Court determined that applying the *Abate* v. *Mundt*, 403 U. S. 182, population per representative methodology to the disparate borough populations produced a total deviation of 132.9% from voter equality among the electorates, and that the city's explanations for this range neither required nor justified such a gross deviation. The Court of Appeals affirmed, holding, *inter alia*, that the presence of citywide representatives did not warrant departure from the *Abate* methodology and, thus, that the District Court's finding of a 132.9% deviation was correct.

Held: The Board of Estimate's structure is inconsistent with the Equal Protection Clause of the Fourteenth Amendment because, although the boroughs have widely disparate populations, each has equal representation on the board. Pp. 692–703.

(a) Board membership elections are local elections subject to review under the prevailing reapportionment doctrine. The board, composed of officials who become members as a matter of law upon their elections, has a significant range of fiscal and legislative functions common to municipal governments, including assisting in the formulation of the

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*Together with No. 87–1112, *Ponterio* v. *Morris et al.*, also on appeal from the same court.

city's budget, and controlling land-use, contract, and franchise powers. That the citywide members enjoy a 6-to-5 voting majority does not render the board's composition constitutional, since the borough presidents control the outcome of board decisions anytime the citywide members do not vote together and always control budgetary decisions because the mayor has no vote on such matters. Moreover, the *Reynolds-Abate* approach should not be put aside in favor of the theoretical Banzhaf Index—which produces a standard deviation of 30.8% for nonbudget matters and a larger figure for budget items by mathematically calculating a voter's power to determine the outcome of an election—since the latter approach tends to ignore partisanship, race, voting habits, and other characteristics having an impact on general election outcomes. Pp. 692–699.

(b) The presence of citywide members is a major component to be factored into the process of determining the deviation between more or less populous boroughs. This approach—which yields a standard deviation of 78%—recognizes that voters in each borough vote for, and are represented by, both their borough president and the citywide members, thus departing from the lower courts' approach which treated the five boroughs as single-member districts, each with a representative having a single vote. Pp. 699–701.

(c) The city's proffered governmental interests—that the board is essential to the successful government of New York City, is effective, and accommodates natural and political boundaries as well as local interests—do not suffice to justify a 78% deviation from the one-person, one-vote ideal, particularly because the city could be served by alternative ways of constituting the board that would minimize the discrimination in voting power. Pp. 701–703.

831 F. 2d 384, affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and MARSHALL, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed an opinion concurring in part and concurring in the judgment, in which STEVENS, J., joined, *post*, p. 703. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 703.

Peter L. Zimroth argued the cause for appellants in both cases. With him on the briefs for appellants in No. 87–1022 were *Leonard J. Koerner*, *Jeffrey D. Friedlander*, *Stephen J. McGrath*, and *Fay Leoussis*. *Philip G. Minardo* filed briefs for appellant in No. 87–1112.

Richard D. Emery argued the cause for appellees in both cases. With him on the brief were *Paul W. Kahn*, *Arthur N. Eisenberg*, *John A. Powell*, and *Steven R. Shapiro*.†

JUSTICE WHITE delivered the opinion of the Court.

The Board of Estimate of the City of New York consists of three members elected citywide, plus the elected presidents of each of the city's five boroughs. Because the boroughs have widely disparate populations—yet each has equal representation on the board—the Court of Appeals for the Second Circuit held that this structure is inconsistent with the Equal Protection Clause of the Fourteenth Amendment. We affirm.

Appellees, residents and voters of Brooklyn, New York City's most populous borough, commenced this action against the city in December 1981.[1] They charged that the city's charter sections that govern the composition of the Board of Estimate[2] are inconsistent with the Equal Protection Clause

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†Briefs of *amici curiae* urging reversal were filed for the Staten Island League for Better Government by *Michael Weinberger;* for Abraham D. Beame et al. by *Edward N. Costikyan*, *Simon H. Rifkind*, and *Gerard E. Harper;* and for John J. Marchi by *Mr. Marchi*, *pro se*, and *David Jaffe*.

Briefs of *amici curiae* urging affirmance were filed for the Citizens Union of the city of New York by *John V. Lindsay*, *Donald J. Cohn*, and *Alan Rothstein;* and for Peter F. Vallone et al. by *Mr. Vallone*, *pro se*, and *Susan Belgard*.

John F. Banzhaf III, *pro se*, filed a brief as *amicus curiae*.

[1] Appellants in No. 87–1022 are New York City, the city's Board of Estimate, the board's eight members, and intervenor-defendant Robert Straniere, a New York State Assembly member. Frank Ponterio, a resident of Staten Island, and an intervening defendant below, is the appellant in No. 87–1112.

[2] Section 61 of the New York City Charter (1986) reads: "Membership. The mayor, the comptroller, the president of the council, and the presidents of the boroughs shall constitute the board of estimate." Section 62 reads: "Voting in the Board. a. As members of the board of estimate, the

of the Fourteenth Amendment as construed and applied in various decisions of this Court dealing with districting and apportionment for the purpose of electing legislative bodies. The District Court dismissed the complaint, 551 F. Supp. 652 (EDNY 1982), on the ground that the board was not subject to the rule established by *Reynolds* v. *Sims*, 377 U. S. 533 (1964), its companion cases, and its progeny, such as *Abate* v. *Mundt*, 403 U. S. 182 (1971), because in its view the board is a nonelective, nonlegislative body. The Court of Appeals reversed. 707 F. 2d 686 (CA2 1983). Because all eight officials on the board ultimately are selected by popular vote, the court concluded that the board's selection process must comply with the so-called "one-person, one-vote" requirement of the reapportionment cases. The court remanded to the District Court to ascertain whether this compliance exists. Bifurcating the proceedings, the District Court determined first, that applying this Court's methodology in *Abate* v. *Mundt*, *supra*, to the disparate borough populations produced a total deviation of 132.9% from voter equality among these electorates, 592 F. Supp. 1462 (EDNY 1984); and second, that the city's several explanations for this range neither require nor justify the electoral scheme's gross deviation from equal representation. 647 F. Supp. 1463 (EDNY 1986). The court thus found it unnecessary to hold that the deviation it identified was *per se* unconstitutional.

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mayor, the comptroller and the president of the council shall each be entitled to cast two votes, and the president of each borough shall be entitled to cast one vote. b. Except as otherwise provided in this charter or by law, the board shall act by resolution adopted by a majority of the whole number of votes authorized to be cast by all the members of the board. . . . d. A quorum of the board shall consist of a sufficient number of members thereof to cast six votes, including at least two of the members authorized to cast two votes each." Section 120(d) provides that the mayor may not vote as a board member when the adoption or modification of his proposed budget is at issue.

The Court of Appeals affirmed. 831 F. 2d 384 (CA2 1987). Tracing the imperative of each citizen's equal power to elect representatives from *Reynolds* v. *Sims* to *Abate* v. *Mundt* and beyond, the court endorsed the District Court's focus on population per representative. The court held that the presence of the citywide representatives did not warrant departure from the *Abate* approach and that the District Court's finding of a 132% deviation was correct. Without deciding whether this gross deviation could ever be justified in light of the flexibility accorded to local governments in ordering their affairs, the Court of Appeals, agreeing with the District Court, held inadequate the city's justifications for its departure from the equal protection requirement that elective legislative bodies be chosen from districts substantially equal in population, especially since alternative measures could address the city's valid policy concerns and at the same time lessen the discrimination against voters in the more populous districts. We noted probable jurisdiction in both Nos. 87–1022 and 87–1112, 485 U. S. 986 (1988).[3]

As an initial matter, we reject the city's suggestion that because the Board of Estimate is a unique body wielding nonlegislative powers, board membership elections are not subject to review under the prevailing reapportionment doctrine. The equal protection guarantee of "one-person, one-vote" extends not only to congressional districting plans, see *Wesberry* v. *Sanders*, 376 U. S. 1 (1964), not only to state legislative districting, see *Reynolds* v. *Sims*, *supra*, but also to local government apportionment. *Avery* v. *Midland County*, 390 U. S. 474, 479–481 (1968); *Abate* v. *Mundt*, *supra*, at 185. Both state and local elections are subject to the general rule

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[3] The municipal appellants and intervenor-appellant Straniere served and filed notices of appeal on October 15, 1987, and November 6, 1987, respectively. Intervenor-appellant Ponterio served and filed his notice of appeal on December 16, 1987.

of population equality between electoral districts. No distinction between authority exercised by state assemblies, and the general governmental powers delegated by these assemblies to local, elected officials, suffices to insulate the latter from the standard of substantial voter equality. See *Avery* v. *Midland County, supra,* at 481. This was confirmed in *Hadley* v. *Junior College Dist. of Metropolitan Kansas City,* 397 U. S. 50 (1970):

> "[W]henever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Id.,* at 56.

These cases are based on the propositions that in this country the people govern themselves through their elected representatives and that "each and every citizen has an inalienable right to full and effective participation in the political processes" of the legislative bodies of the Nation, State, or locality as the case may be. *Reynolds* v. *Sims,* 377 U. S., at 565. Since "[m]ost citizens can achieve this participation only as qualified voters through the election of legislators to represent them," full and effective participation requires "that each citizen have an equally effective voice in the election of members of his . . . legislature." *Ibid.* As Daniel Webster once said, "the right to choose a representative is every man's portion of sovereign power." *Luther* v. *Borden,* 7 How. 1, 30 (1849) (statement of counsel). Electoral systems should strive to make each citizen's portion equal. If districts of widely unequal population elect an equal number

of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts. Hence the Court has insisted that seats in legislative bodies be apportioned to districts of substantially equal populations. Achieving "'fair and effective representation of all citizens is . . . the basic aim of legislative apportionment,' *[Reynolds, supra]*, at 565–566; and [it is] for that reason that *[Reynolds]* insisted on substantial equality of populations among districts." *Gaffney* v. *Cummings*, 412 U. S. 735, 748 (1973).

That the members of New York City's Board of Estimate trigger this constitutional safeguard is certain. All eight officials become members as a matter of law upon their various elections. New York City Charter § 61 (1986). The mayor, the comptroller, and the president of the city council, who constitute the board's citywide number, are elected by votes of the entire city electorate. Each of these three cast two votes, except that the mayor has no vote on the acceptance or modification of his budget proposal. Similarly, when residents of the city's five boroughs—the Bronx, Brooklyn, Manhattan, Queens, and Richmond (Staten Island)—elect their respective borough presidents, the elections decide each borough's representative on the board. These five members each have single votes on all board matters.

New York law assigns to the board a significant range of functions common to municipal governments.[4] Fiscal re-

[4] The District Court correctly observes that the board's powers are set forth in the city charter, state legislation, and the New York City Administrative Code. Plaintiffs-appellees submitted to the District Court the following list of board powers:

"A. The Board of Estimate exclusively

"i. determines the use, development and improvement of property owned by the City;

"ii. approves standards, scopes and final designs of capitol *[sic]* projects for the City;

sponsibilities include calculating sewer and water rates, tax abatements, and property taxes on urban development projects. The board manages all city property; exercises plenary zoning authority; dispenses all franchises and leases on city property; fixes generally the salaries of all officers and

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"iii. negotiates and enters into all contracts on behalf of the City;

"iv. negotiates and approves all franchises that are granted by the City;

"v. grants leases of City property and enters into leases of property for City use;

"vi. sets the rates for purchases of water from the City;

"vii. sets the charges for sewer services provided by the City;

"viii. approves or modifies all zoning decisions for the City; and

"ix. sets tax abatements.

"B. The Board of Estimate acting in conjunction with the New York City Council

"i. recommends and approves the expense budget of the City without the participation of the Mayor;

"ii. recommends and approves the capital budget of the City without the participation of the Mayor;

"iii. periodically modifies the budgets of the City;

"iv. confers with the City Council when agreement on the budget between the two bodies is not reached;

"v. overrides mayoral vetoes of budget items without the participation of the Mayor; and

"vi. holds hearings on budgetary matters.

"C. The Board of Estimate also

"i. administers the Bureau of Franchises;

"ii. administers the Bureau of the Secretary;

"iii. holds public hearings on any matter of City policy within its responsibilities whenever called upon to do so by the Mayor or in its discretion for the public interest;

"iv. holds hearings on tax abatements that are within the discretion of City administrative agencies; and

"v. makes recommendations to the Mayor or City Council in regard to any matter of City policy." Statement of Facts Pursuant to Local Rule 9(g) in No. 8–CV–3920 (EDNY), App. 44–46.

See also W. H. K. Communications Associations, Inc., The Structure, Powers, and Functions of New York City's Board of Estimate (1973), App. 54 (Kramarsky Study).

persons compensated through city moneys; and grants all city contracts. This array of powers, which the board shares with no other part of the New York City government, are exercised through the aforementioned voting scheme: three citywide officials cast a total of six votes; their five borough counterparts, one vote each.

In addition, and of major significance, the board shares legislative functions with the city council with respect to modifying and approving the city's capital and expense budgets. The mayor submits a proposed city budget to the board and city council, but does not participate in board decisions to adopt or alter the proposal. Approval or modification of the proposed budget requires agreement between the board and the city council. Board votes on budget matters, therefore, consist of four votes cast by two at-large members; and five, by the borough presidents.

This considerable authority to formulate the city's budget, which last fiscal year surpassed $25 billion, as well as the board's land use, franchise, and contracting powers over the city's 7 million inhabitants, situate the board comfortably within the category of governmental bodies whose "powers are general enough and have sufficient impact throughout the district" to require that elections to the body comply with equal protection strictures. See *Hadley* v. *Junior College Dist.*, 397 U. S. at 54.

The city also erroneously implies that the board's composition survives constitutional challenge because the citywide members cast a 6-to-5 majority of board votes and hence are in position to control the outcome of board actions. The at-large members, however, as the courts below observed, often do not vote together; and when they do not, the outcome is determined by the votes of the borough presidents, each having one vote. Two citywide members, with the help of the presidents of the two least populous boroughs, the Bronx and Staten Island, will prevail over a disagreeing coalition

of the third citywide member and the presidents of the three boroughs that contain a large majority of the city's population. Furthermore, because the mayor has no vote on budget issues, the citywide members alone cannot control board budgetary decisions.

The city's primary argument is that the courts below erred in the methodology by which they determined whether, and to what extent, the method of electing the board members gives the voters in some boroughs more power than the voters in other boroughs. Specifically, the city focuses on the relative power of the voters in the various boroughs to affect board decisions, an approach which involves recognizing the weighted voting of the three citywide members.

As described by the Court of Appeals, 831 F. 2d, at 386, n. 2 (the city's description is essentially the same, Brief for Municipal Appellants 35–36), the method urged by the city to determine an individual voter's power to affect the outcome of a board vote first calculates the power of each member of the board to affect a board vote, and then calculates voters' power to cast the determining vote in the election of that member. This method, termed the Banzhaf Index, applies as follows: 552 possible voting combinations exist in which any one member can affect the outcome of a board vote. Each borough president can cast the determining vote in 48 of these combinations (giving him a "voting power" of 8.7%), while each citywide member can determine the outcome in 104 of 552 combinations (18.8%). A citizen's voting power through each representative is calculated by dividing the representative's voting power by the square root of the population represented; a citizen's total voting power thus aggregates his power through each of his four representatives—borough president, mayor, comptroller, and council president. Deviation from ideal voting power is then calculated by comparing this figure with the figure arrived at when one con-

siders an electoral district of ideal population. Calculated in this manner, the maximum deviation in the voting power to control board outcomes is 30.8% on nonbudget matters, and, because of the mayor's absence, a higher deviation on budget issues.

The Court of Appeals gave careful attention to and rejected this submission. We agree with the reasons given by the Court of Appeals that the population-based approach of our cases from *Reynolds* through *Abate* should not be put aside in this litigation. We note also that we have once before, although in a different context, declined to accept the approach now urged by the city. *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971). In that case we observed that the Banzhaf methodology "remains a theoretical one" and is unrealistic in not taking into account "any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation." *Id.*, at 145–146.

The personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to determine the outcome of an election, shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way, if he may vote for one representative and the voters in another district half the size also elect one representative. Even if a desired outcome is the motivating factor bringing voters to the polls, the Court of Appeals in this case considered the Banzhaf Index an unrealistic approach to determining whether citizens have an equal voice in electing their representatives because the approach tends to ignore partisanship, race, and voting habits or other characteristics having an impact on election outcomes.

The Court of Appeals also thought that the city's approach was "seriously defective in the way it measures Board mem-

bers' power to determine the outcome of a Board vote." 831 F. 2d, at 390. The difficulty was that this method did not reflect the way the board actually works in practice; rather, the method is a theoretical explanation of each board member's power to affect the outcome of board actions. It may be that in terms of assuring fair and effective representation, the equal protection approach reflected in the *Reynolds* v. *Sims* line of cases is itself imperfect, but it does assure that legislators will be elected by, and represent citizens in, districts of substantially equal size. It does not attempt to inquire whether, in terms of how the legislature actually works in practice, the districts have equal power to affect a legislative outcome. This would be a difficult and ever-changing task, and its challenge is hardly met by a mathematical calculation that itself stops short of examining the actual day-to-day operations of the legislative body. The Court of Appeals in any event thought there was insufficient reason to depart from our prior cases, and we agree.[5]

Having decided to follow the established method of resolving equal protection issues in districting and apportionment cases, the Court of Appeals then inquired whether the presence of at-large members on the board should be factored into the process of determining the deviation between the more and less populous boroughs. The court decided that they need not be taken into account because the at-large members

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[5] Similarly, we reject appellant Ponterio's submission, which disagrees with both the Court of Appeals and the city. Ponterio puts aside a citizens' theoretical ability to cast a tie-breaking vote for their representative and focuses only on each borough representative's tie-breaking power on the board. Brief for Appellant Ponterio in No. 87–1112, pp. 17–23. The formula suffers from the criticisms applicable to the Banzhaf Index generally. Ponterio's argument in some ways is also inconsistent with our insistence that the equal protection analysis in this context focuses on representation of people, not political or economic interests. See, *e. g.*, *Reynolds* v. *Sims*, 377 U. S. 533, 561, 562 (1964); *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972).

and the borough presidents respond to different constituencies. The three at-large members obviously represent city-wide interests; but, in the Court of Appeals' judgment, the borough presidents represent and are responsive to their boroughs, yet each has one vote despite the dramatic inequalities in the boroughs' populations. Consideration of the city-wide members might be different, the court explained, "[i]f the at-large bloc was not simply a majority, but a majority such that it would always and necessarily control the governing body, and the district representatives play a decidedly subsidiary role . . . ." 831 F. 2d, at 389, n. 5. Like Judge Newman in concurrence, however, the court noted that this was decidedly not true of the board.[6]

The Court of Appeals then focused on the five boroughs as single-member districts, electing five representatives to the board, each with a single vote. Applying the formula that we have utilized without exception since 1971, see *Abate* v. *Mundt*, 403 U. S., at 184 and n. 1; *Gaffney* v. *Cummings*, 412 U. S., at 737; *Brown* v. *Thomson*, 462 U. S. 835 (1983), the Court of Appeals agreed with the District Court that the maximum percentage deviation from the ideal population is 132.9%.[7]

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[6] The Court of Appeals writes: "Though the appellant Board insists on referring to 'an at-large majority voting bloc,' in fact there is no such 'bloc.' Rather, this supposed 'bloc' consists of three persons having two votes each who are free to, and do, vote on different sides of various issues. Only if all three vote together are they bound to carry the day. Furthermore, on certain budget issues, on which the mayor does not vote, the at-large members cannot win a vote without the support of a borough president. It follows that there is no majority-at-large voting bloc bound to control the Board and that this case is far removed from the hypotheticals offered by the Board and Amicus Banzhaf." 831 F. 2d, at 389, n. 5 (citation omitted).

[7] That percentage is the sum of the percentage by which Brooklyn, the city's most populous district (population 2,230,936), exceeds the ideal district population (1,414,206), and the percentage by which Staten Island,

We do not agree with the Court of Appeals' approach. In calculating the deviation among districts, the relevant inquiry is whether "the vote of any citizen is approximately equal in weight to that of any other citizen," *Reynolds* v. *Sims*, 377 U. S., at 579, the aim being to provide "fair and effective representation for all citizens," *id.*, at 565–566. Here the voters in each borough vote for the at-large members as well as their borough president, and they are also represented by those members. Hence in determining whether there is substantially equal voting power and representation, the citywide members are a major component in the calculation and should not be ignored.[8]

Because of the approach followed by the District Court and the Court of Appeals, there was no judicial finding concerning the total deviation from the ideal that would be if the at-large members of the board are taken into account. In pleadings filed with the District Court, however, appellees indicated, and the city agreed, that the deviation would then be 78%. See App. 47, 206, 375–376. This deviation was

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the least populous (352,151), falls below this ideal. Queens' population was stipulated to be 1,891,325; Manhattan's, 1,427,533; and the Bronx's, 1,169,115. The parties stipulated, therefore, that the city's total population is 7,071,030. See App. to Juris. Statement in No. 87–1112, pp. 9–10, 11.

[8] Appellees point out that in *Avery* v. *Midland County*, 390 U. S. 474 (1968), we struck down a county apportionment scheme consisting of four district representatives and one at-large member without considering the effect of the at-large representative. In that case, however, we were not faced with the task of determining the disparity in voting power among districts of different population; the issue before the Court was whether our decision in *Reynolds* v. *Sims*, requiring that state legislatures be apportioned on the basis of population, applied as well to local government legislative bodies. 390 U. S., at 478–479. Nothing in *Avery* even remotely suggests that the impact of at-large representatives is to be ignored in determining whether an apportionment scheme violates the Equal Protection Clause.

confirmed at oral argument.[9] Tr. of Oral Arg. 14–15, 39–40. And as to budget matters, when only two citywide members participate, the deviation would be somewhat larger. We accept for purposes of this case the figure agreed upon by the parties.

We note that no case of ours has indicated that a deviation of some 78% could ever be justified. See *Brown* v. *Thomson*, *supra*, at 846–847; *Connor* v. *Finch*, 431 U. S. 407, 410–420 (1977); *Chapman* v. *Meier*, 420 U. S. 1, 21–26 (1975); *Mahan* v. *Howell*, 410 U. S. 315, 329 (1973). At the very least, the local government seeking to support such a difference between electoral districts would bear a very difficult burden, and we are not prepared to differ with the holding of the courts below that this burden has not been carried. The city presents in this Court nothing that was not considered below, arguing chiefly that the board, as presently structured, is essential to the successful government of a regional entity, the City of New York. The board, it is said, accommodates natural and political boundaries as well as local interests. Furthermore, because the board has been effective it should not be disturbed. All of this, the city urges, is supported by the city's history. The courts below, of course, are in a much

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[9] At oral argument in this Court, the city conceded this point: "QUESTION: . . . If we use the Abate method and took the three at-large officers and factored them into the analysis, what would the population deviation be? Or can we not determine that based on this record? Mr. ZIMROTH [counsel for the city]: It depends on how you factor them in. There's one way of factoring them in which would divide the number of city-wide votes proportionately among all of the counties *[sic]*. . . . If you use that method, you come up with a number of 76 *[sic]* percent. . . . [T]hat's the answer to your question. That's the result you get if you use that methodology." Tr. of Oral Arg. 14–15. Appellees' counsel also stated that the deviation "came to 78 percent when you allocated that way." *Id.*, at 39–40. Although Ponterio rejected the 78% figure in the District Court, he did so only in reliance on his modified Banzhaf test. For reasons already stated, that reliance is misplaced.

better position than we to assess the weight of these arguments, and they concluded that the proffered governmental interests were either invalid or were not sufficient to justify a deviation of 132%,[10] in part because the valid interests of the city could be served by alternative ways of constituting the board that would minimize the discrimination in voting power among the five boroughs.[11] Their analysis is equally applicable to a 78% deviation, and we conclude that the city's proffered governmental interests do not suffice to justify such a substantial departure from the one-person, one-vote ideal.

Accordingly the judgment of the Court of Appeals is

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE STEVENS joins, concurring in part and concurring in the judgment.

I agree with the opinion of the Court except insofar as it holds that the Court of Appeals should have taken the at-large members of the board into account in calculating the deviation from voter equality. For the reasons given by the Court of Appeals, I would exclude those members from this calculation.

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I, too, would affirm the judgment below and share many of the Court's reasons for doing so.

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[10] We note also that we are not persuaded by arguments that explain the debasement of citizens' constitutional right to equal franchise based on exigencies of history or convenience. See *Reynolds*, 377 U. S., at 579–580 ("Citizens, not history or economic interests, cast votes"); see also *Maryland Committee for Fair Representation* v. *Tawes*, 377 U. S. 656, 675 (1964); *Lucas* v. *Forty-Fourth Colorado General Assembly*, 377 U. S. 713, 738 (1964).

[11] We are not presented with the question of the constitutionality of the alternative board structures suggested by the District Court and the Court of Appeals.

I agree with the majority that measuring the degree of voter inequality in these cases requires inclusion of the at-large members of the Board of Estimate. I also suspect the Court is correct in rejecting the Banzhaf Index here. But, as the Court itself notes, *ante*, at 698, under the Index the deviation from voter equality measures 30.8% for nonbudget matters, and a still larger figure for budget issues. Even this measure of voter inequality is too large to be constitutional and, for the reasons given by the District Court, 647 F. Supp. 1463 (EDNY 1986), cannot be justified by the interests asserted by the city.

SCHMUCK *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 87–6431. Argued November 30, 1988—Decided March 22, 1989

Petitioner used-car distributor was charged with multiple counts of mail fraud. The indictment alleged that he purchased used cars, rolled back their odometers, and sold them to Wisconsin retail dealers at prices artificially inflated by the low-mileage readings, and that the unwitting dealers, relying on the altered readings, resold the cars to customers at inflated prices, consummating the transactions by mailing title-application forms to the State on behalf of the buyers. Petitioner filed a pretrial motion to dismiss on the ground that the latter mailings were not in furtherance of the fraudulent scheme and, thus, did not satisfy the mailing element of the crime of mail fraud. He also moved under Federal Rule of Criminal Procedure 31(c) for a lesser included offense jury instruction on the crime of tampering with an odometer. The District Court denied both motions, and, after trial, the jury returned guilty verdicts on all counts. A Court of Appeals panel initially ruled that, although the mailings satisfied the mailing element of the crime, the requested jury instruction should have been given under the "inherent relationship" test, which considers one offense to be included in another when the facts as alleged and proved support the inference that the defendant committed the less serious crime, and when an "inherent relationship" exists between the two offenses such that both relate to the protection of the same interests and the proof of the greater offense can generally be expected to require proof of the lesser one. However, the Court of Appeals en banc rejected the "inherent relationship" test in favor of the "elements" test, whereby one offense is necessarily included within another only when the elements of the lesser offense form a subset of the elements of the offense charged. Finding that the elements of odometer tampering are not a subset of the elements of mail fraud, the en banc court affirmed petitioner's conviction.

Held:

1. The mailings at issue satisfy the mailing element of the crime of mail fraud. Such mailings need not, as petitioner contends, be an essential element of the scheme to defraud, but are sufficient so long as they are incident to an essential part of the scheme. Here, although the mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the successful

passage of title to the cars, which in turn was essential to the perpetuation of the scheme to defraud, since a failure in the passage of title would have jeopardized petitioner's relationship of trust and goodwill with the dealers upon whose unwitting cooperation the scheme depended. *Kann* v. *United States*, 323 U. S. 88; *Parr* v. *United States*, 363 U. S. 370; and *United States* v. *Maze*, 414 U. S. 395, distinguished. Pp. 710–715.

2. The elements test must be utilized in determining when a lesser included offense instruction is appropriate under Rule 31(c). Pp. 715–721.

(a) The Rule's language—which provides in relevant part that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged"—supports the application of the elements approach. That language suggests that a comparison must be drawn between *offenses*—and therefore between the statutory elements of the offenses in question—whereas the inherent relationship approach mandates that the determination be made by reference to conduct proved at trial regardless of the statutory definitions of offenses. Furthermore, while the elements test is true to the Rule's requirement that the lesser offense be included in the greater, the inherent relationship approach dispenses with that requirement by permitting an instruction even if the proof of one offense does not invariably require proof of the other, as long as the two offenses serve the same legislative goals. Moreover, although the Rule implicitly suggests that an instruction is equally available to the prosecution and the defense, the inherent relationship approach—which delays the determination whether the offenses are sufficiently related until all the evidence is developed—renders such mutuality impossible. Pp. 716–718.

(b) The elements approach is grounded in the Rule's history, which demonstrates that that approach was settled doctrine at the time of the Rule's promulgation and thereafter, and that the Rule incorporated this established practice by restating the pre-existing law. Pp. 718–720.

(c) Since the elements test involves an objective, textual comparison of criminal statutes and does not depend on inferences that may be drawn on evidence introduced at trial, it is far more certain and predictable in its application than the inherent relationship approach. Pp. 720–721.

3. Petitioner was not entitled to a lesser included offense instruction. The offense of odometer tampering includes the element of knowingly and willfully causing an odometer to be altered, which is not a subset of any element of mail fraud. Pp. 721–722.

840 F. 2d 384, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, and KENNEDY, JJ., joined. SCALIA, J., filed

a dissenting opinion, in which BRENNAN, MARSHALL, and O'CONNOR, JJ., joined, *post*, p. 722.

Peter L. Steinberg by appointment of the Court, 486 U. S. 1041, argued the cause and filed briefs for petitioner.

Brian J. Martin argued the cause for the United States. With him on the brief were *Solicitor General Fried, Acting Assistant Attorney General Dennis, Deputy Solicitor General Bryson*, and *Louis M. Fischer.*

JUSTICE BLACKMUN delivered the opinion of the Court.

I

In August 1983, petitioner Wayne T. Schmuck, a used-car distributor, was indicted in the United States District Court for the Western District of Wisconsin on 12 counts of mail fraud, in violation of 18 U. S. C. §§ 1341 and 1342. App. 3.

The alleged fraud was a common and straightforward one. Schmuck purchased used cars, rolled back their odometers, and then sold the automobiles to Wisconsin retail dealers for prices artificially inflated because of the low-mileage readings. These unwitting car dealers, relying on the altered odometer figures, then resold the cars to customers, who in turn paid prices reflecting Schmuck's fraud. To complete the resale of each automobile, the dealer who purchased it from Schmuck would submit a title-application form to the Wisconsin Department of Transportation on behalf of his retail customer. The receipt of a Wisconsin title was a prerequisite for completing the resale; without it, the dealer could not transfer title to the customer and the customer could not obtain Wisconsin tags. The submission of the title-application form supplied the mailing element of each of the alleged mail frauds.

Before trial, Schmuck moved to dismiss the indictment on the ground that the mailings at issue—the submissions of the title-application forms by the automobile dealers—were not in furtherance of the fraudulent scheme and, thus, did not

satisfy the mailing element of the crime of mail fraud. Schmuck also moved under Federal Rule of Criminal Procedure 31(c)[1] for a jury instruction on the then misdemeanor offense of tampering with an odometer, 15 U. S. C. §§ 1984 and 1990c(a) (1982 ed.).[2] The District Court denied both motions.[3] After trial, the jury returned guilty verdicts on all 12 counts.

A divided panel of the United States Court of Appeals for the Seventh Circuit reversed and remanded the case for a new trial. 776 F. 2d 1368 (1985). Although the panel rejected Schmuck's claim that he was entitled to a judgment of acquittal because the mailings were not made in furtherance of his scheme, it ruled that under Rule 31(c) the District Court should have instructed the jury on the lesser offense of odometer tampering. The panel applied the so-called "inherent relationship" test for determining what constitutes a lesser included offense for the purpose of Rule 31(c). See, *e. g.*, *United States* v. *Whitaker*, 144 U. S. App. D. C. 344, 349, 447 F. 2d 314, 319 (1971). Under that test, one offense is included in another when the facts as alleged in the indictment and proved at trial support the inference that

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[1] Rule 31(c) provides in relevant part: "The defendant may be found guilty of an offense necessarily included in the offense charged."

[2] In 1986, Congress made odometer tampering a felony. Pub. L. 99–579, § 3(b), 100 Stat. 3311, 15 U. S. C. § 1990c(a) (1982 ed., Supp. V).

[3] The District Court concluded that whether the mailings alleged in the indictment furthered the fraudulent scheme was a "matter to be determined at trial." App. 12. The court concluded that Schmuck was not entitled to the lesser offense instruction because odometer tampering was not a necessarily included offense of mail fraud. *Id.*, at 28. Schmuck raised these objections again in support of a motion for acquittal at the close of the Government's case. *Id.*, at 55–59. That motion was denied. *Id.*, at 60.

The District Court instructed the jury that in order to find Schmuck guilty of mail fraud the jury had to find beyond a reasonable doubt that he knowingly devised a scheme to defraud, and that he caused matter to be sent in the mail for the purpose of executing that scheme. Tr. 189. The court also told the jury that it could find Schmuck guilty if the use of the mails was reasonably foreseeable. *Id.*, at 191.

the defendant committed the less serious offense, and an "inherent relationship" exists between the two offenses. This relationship arises when the two offenses relate to the protection of the same interests and the proof of the greater offense can generally be expected to require proof of the lesser offense. *Ibid.* Applying this test, the court concluded that both the mail fraud and odometer tampering statutes protect against fraud, and that the proof of mail fraud generally entails proving the underlying fraudulent conduct.[4] The panel then held that Schmuck was entitled to the lesser offense instruction because a rational jury could have found him guilty of odometer tampering, yet acquitted him of mail fraud on the ground that the mailings were too tangential to the fraudulent scheme to satisfy the requirements of mail fraud.

The Court of Appeals vacated the panel decision and ordered the case to be reheard en banc. 784 F. 2d 846 (1986). On rehearing, by a divided vote, 840 F. 2d 384 (1988), the en banc court rejected the "inherent relationship" test for defining lesser included offenses, and adopted instead the "elements test" whereby one offense is necessarily included within another only when the elements of the lesser offense form a subset of the elements of the offense charged. *Id.*, at 387. The Court of Appeals found that the elements test "is grounded in the terms and history of Rule 31(c), comports with the constitutional requirement of notice to defendant of the potential for conviction of an offense not separately charged, permits a greater degree of certainty in the application of Rule 31(c), and harmonizes the concept of 'necessarily included' under Rule 31(c) with that of a lesser included offense where the issue is double jeopardy." *Id.*, at 388. Applying the elements test, the Court of Appeals held that Schmuck was not entitled to a jury instruction on the offense of odometer tampering because he could have been convicted

[4] One judge, concurring in part and dissenting in part, agreed with the panel's application of the inherent relationship test, but found no such relationship between mail fraud and odometer tampering. 776 F. 2d, at 1373.

of mail fraud without a showing that he actually altered the odometers, but could not have been convicted of odometer tampering absent such a showing. Since the elements of odometer tampering are not a subset of the elements of mail fraud, odometer tampering did not qualify as a lesser included offense of mail fraud and, accordingly, the District Court was not required under Rule 31(c) to instruct the jury on the odometer-tampering offense.

We granted certiorari, 486 U. S. 1004 (1988), to define further the scope of the mail fraud statute and to resolve a conflict among the Circuits over which test to apply in determining what constitutes a lesser included offense for the purposes of Rule 31(c).[5]

II

"The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann* v. *United States*, 323 U. S. 88, 95 (1944).[6] To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. *Pereira* v. *United States*, 347 U. S. 1, 8 (1954). It is sufficient for the

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[5] Compare, *e. g.*, *United States* v. *Whitaker*, 144 U. S. App. D. C. 344, 349, 447 F. 2d 314, 319 (1971) (inherent relationship test), and *United States* v. *Martin*, 783 F. 2d 1449, 1451 (CA9 1986) (same), with *United States* v. *Campbell*, 652 F. 2d 760, 761–762 (CA8 1981) (elements test), and *Government of Virgin Islands* v. *Joseph*, 765 F. 2d 394, 396 (CA3 1985) (same).

[6] The statute provides in relevant part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do . . . knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U. S. C. § 1341.

mailing to be "incident to an essential part of the scheme," *ibid.*, or "a step in [the] plot," *Badders* v. *United States*, 240 U. S. 391, 394 (1916).

Schmuck, relying principally on this Court's decisions in *Kann*, *supra*, *Parr* v. *United States*, 363 U. S. 370 (1960), and *United States* v. *Maze*, 414 U. S. 395 (1974), argues that mail fraud can be predicated only on a mailing that affirmatively assists the perpetrator in carrying out his fraudulent scheme. The mailing element of the offense, he contends, cannot be satisfied by a mailing, such as those at issue here, that is routine and innocent in and of itself, and that, far from furthering the execution of the fraud, occurs after the fraud has come to fruition, is merely tangentially related to the fraud, and is counterproductive in that it creates a "paper trail" from which the fraud may be discovered. Brief for Petitioner 20–24. We disagree both with this characterization of the mailings in the present case and with this description of the applicable law.

We begin by considering the scope of Schmuck's fraudulent scheme. Schmuck was charged with devising and executing a scheme to defraud Wisconsin retail automobile customers who based their decisions to purchase certain automobiles at least in part on the low-mileage readings provided by the tampered odometers. This was a fairly large-scale operation. Evidence at trial indicated that Schmuck had employed a man known only as "Fred" to turn back the odometers on about 150 different cars. Tr. 102–103. Schmuck then marketed these cars to a number of dealers, several of whom he dealt with on a consistent basis over a period of about 15 years. *Id.*, at 33–34, 53. Indeed, of the 12 automobiles that are the subject of the counts of the indictment, 5 were sold to "P and A Sales," and 4 to "Southside Auto." App. 6–7. Thus, Schmuck's was not a "one-shot" operation in which he sold a single car to an isolated dealer. His was an ongoing fraudulent venture. A rational jury could have concluded that the success of Schmuck's venture de-

pended upon his continued harmonious relations with, and good reputation among, retail dealers, which in turn required the smooth flow of cars from the dealers to their Wisconsin customers.

Under these circumstances, we believe that a rational jury could have found that the title-registration mailings were part of the execution of the fraudulent scheme, a scheme which did not reach fruition until the retail dealers resold the cars and effected transfers of title. Schmuck's scheme would have come to an abrupt halt if the dealers either had lost faith in Schmuck or had not been able to resell the cars obtained from him. These resales and Schmuck's relationships with the retail dealers naturally depended on the successful passage of title among the various parties. Thus, although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck's scheme. As noted earlier, a mailing that is "incident to an essential part of the scheme," *Pereira*, 347 U. S., at 8, satisfies the mailing element of the mail fraud offense. The mailings here fit this description. See, *e. g.*, *United States* v. *Locklear*, 829 F. 2d 1314, 1318–1319 (CA4 1987) (retail customers obtaining title documents through the mail furthers execution of wholesaler's odometer tampering scheme); *United States* v. *Galloway*, 664 F. 2d 161, 163–165 (CA7 1981) (same), cert. denied, 456 U. S. 1006 (1982); cf. *United States* v. *Shryock*, 537 F. 2d 207, 208–209 (CA5 1976) (local motor vehicle department's mailing of title applications to state headquarters furthers retailer's odometer-tampering scheme), cert. denied, 429 U. S. 1100 (1977).

Once the full flavor of Schmuck's scheme is appreciated, the critical distinctions between this case and the three cases in which this Court has delimited the reach of the mail fraud statute—*Kann*, *Parr*, and *Maze*—are readily apparent. The defendants in *Kann* were corporate officers and directors

accused of setting up a dummy corporation through which to divert profits into their own pockets. As part of this fraudulent scheme, the defendants caused the corporation to issue two checks payable to them. The defendants cashed these checks at local banks, which then mailed the checks to the drawee banks for collection. This Court held that the mailing of the cashed checks to the drawee banks could not supply the mailing element of the mail fraud charges. The defendants' fraudulent scheme had reached fruition. "It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank." 323 U. S., at 94.

In *Parr*, several defendants were charged, *inter alia*, with having fraudulently obtained gasoline and a variety of other products and services through the unauthorized use of a credit card issued to the school district which employed them. The mailing element of the mail fraud charges in *Parr* was purportedly satisfied when the oil company which issued the credit card mailed invoices to the school district for payment, and when the district mailed payment in the form of a check. Relying on *Kann*, this Court held that these mailings were not in execution of the scheme as required by the statute because it was immaterial to the defendants how the oil company went about collecting its payment. 363 U. S., at 393.[7]

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[7] *Parr* also involved a second fraudulent scheme through which the defendant school board members misappropriated school district tax revenues. The Government argued that the mailing element of the mail fraud charges was supplied by the mailing of tax statements, checks, and receipts. This Court held, however, that in the absence of any evidence that the tax levy was increased as part of the fraud, the mailing element of the offense could not be supplied by mailings "made or caused to be made under the imperative command of duty imposed by state law." 363 U. S., at 391. No such legal duty is at issue here. Whereas the mailings of the tax documents in *Parr* were the direct product of the school district's state constitutional duty to levy taxes, *id.*, at 387, and would have been made regardless of the defendants' fraudulent scheme, the mailings in the

Later, in *Maze*, the defendant allegedly stole his roommate's credit card, headed south on a winter jaunt, and obtained food and lodging at motels along the route by placing the charges on the stolen card. The mailing element of the mail fraud charge was supplied by the fact that the defendant knew that each motel proprietor would mail an invoice to the bank that had issued the credit card, which in turn would mail a bill to the card owner for payment. The Court found that these mailings could not support mail fraud charges because the defendant's scheme had reached fruition when he checked out of each motel. The success of his scheme in no way depended on the mailings; they merely determined which of his victims would ultimately bear the loss. 414 U. S., at 402.

The title-registration mailings at issue here served a function different from the mailings in *Kann*, *Parr*, and *Maze*. The intrabank mailings in *Kann* and the credit card invoice mailings in *Parr* and *Maze* involved little more than post-fraud accounting among the potential victims of the various schemes, and the long-term success of the fraud did not turn on which of the potential victims bore the ultimate loss. Here, in contrast, a jury rationally could have found that Schmuck by no means was indifferent to the fact of who bore the loss. The mailing of the title-registration forms was an essential step in the successful passage of title to the retail purchasers. Moreover, a failure of this passage of title would have jeopardized Schmuck's relationship of trust and goodwill with the retail dealers upon whose unwitting cooperation his scheme depended. Schmuck's reliance on our prior cases limiting the reach of the mail fraud statute is simply misplaced.

To the extent that Schmuck would draw from these previous cases a general rule that routine mailings that are in-

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present case, though in compliance with Wisconsin's car-registration procedure, were derivative of Schmuck's scheme to sell "doctored" cars and would not have occurred but for that scheme.

nocent in themselves cannot supply the mailing element of the mail fraud offense, he misapprehends this Court's precedents. In *Parr* the Court specifically acknowledged that "innocent" mailings—ones that contain no false information—may supply the mailing element. 363 U. S., at 390. In other cases, the Court has found the elements of mail fraud to be satisfied where the mailings have been routine. See, *e. g.*, *Carpenter* v. *United States*, 484 U. S. 19, 28 (1987) (mailing newspapers).

We also reject Schmuck's contention that mailings that someday may contribute to the uncovering of a fraudulent scheme cannot supply the mailing element of the mail fraud offense. The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud. The mail fraud statute includes no guarantee that the use of the mails for the purpose of executing a fraudulent scheme will be risk free. Those who use the mails to defraud proceed at their peril.

For these reasons, we agree with the Court of Appeals that the mailings in this case satisfy the mailing element of the mail fraud offenses.

III

Federal Rule of Criminal Procedure 31(c) provides in relevant part: "The defendant may be found guilty of an offense necessarily included in the offense charged." As noted above, the Courts of Appeals have adopted different tests to determine when, under this Rule, a defendant is entitled to a lesser included offense instruction. The Seventh Circuit's original panel opinion applied the "inherent relationship" approach formulated in *United States* v. *Whitaker*, 144 U. S. App. D. C. 344, 447 F. 2d 314 (1971):

> "[D]efendant is entitled to invoke Rule 31(c) when a lesser offense is established by the evidence adduced at

> trial in proof of the greater offense, with the caveat that there must also be an 'inherent' relationship between the greater and lesser offenses, *i. e.*, they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense." *Id.*, at 349, 447 F. 2d, at 319.

The en banc Seventh Circuit rejected this approach in favor of the "traditional," or "elements" test. Under this test, one offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c).

We now adopt the elements approach to Rule 31(c). As the Court of Appeals noted, this approach is grounded in the language and history of the Rule and provides for greater certainty in its application. It, moreover, is consistent with past decisions of this Court which, though not specifically endorsing a particular test, employed the elements approach in cases involving lesser included offense instructions.[8]

First, the wording of Rule 31(c), although not conclusive, supports the application of the elements approach. The Rule speaks in terms of an offense that is "necessarily included in the offense charged." This language suggests that the comparison to be drawn is between *offenses*. Since offenses are statutorily defined, that comparison is appropriately conducted by reference to the statutory elements of the offenses in question, and not, as the inherent relationship approach

[8] Our decision in no way alters the independent prerequisite for a lesser included offense instruction that the evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater. *Keeble* v. *United States*, 412 U. S. 205, 208 (1973).

would mandate, by reference to conduct proved at trial regardless of the statutory definitions. Furthermore, the language of Rule 31(c) speaks of the necessary *inclusion* of the lesser offense in the greater. While the elements test is true to this requirement, the inherent relationship approach dispenses with the required relationship of necessary inclusion: the inherent relationship approach permits a lesser included offense instruction even if the proof of one offense does not invariably require proof of the other as long as the two offenses serve the same legislative goals.

In addition, the inherent relationship approach, in practice, would require that Rule 31(c) be applied in a manner inconsistent with its language. The Rule provides that a defendant "may be found guilty" of a lesser included offense, without distinguishing between a request for jury instructions made by the Government and one made by the defendant. In other words, the language of the Rule suggests that a lesser included offense instruction is available in equal measure to the defense and to the prosecution.[9] Yet, under the inherent relationship approach, such mutuality is impossible.

It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him. See *Ex parte Bain*, 121 U. S. 1, 10 (1887); *Stirone* v. *United*

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[9] This reading of the Rule is consistent with its origins. The Rule "developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged." *Beck* v. *Alabama*, 447 U. S. 625, 633 (1980).

Of course, it is now firmly established that Rule 31(c)'s provision for lesser offense instructions benefits the defendant as well. The Court recognized in *Keeble* v. *United States*, *supra*, that where the jury suspects that the defendant is plainly guilty of *some* offense, but one of the elements of the charged offense remains in doubt, in the absence of a lesser offense instruction, the jury will likely fail to give full effect to the reasonable-doubt standard, resolving its doubts in favor of conviction. *Id.*, at 212–213. The availability of a lesser included offense instruction protects the defendant from such improper conviction.

States, 361 U. S. 212, 215–217 (1960); *United States* v. *Miller*, 471 U. S. 130, 140, 142–143 (1985). This stricture is based at least in part on the right of the defendant to notice of the charge brought against him. *United States* v. *Whitaker*, 144 U. S. App. D. C., at 350–351, 447 F. 2d, at 320–321. Were the prosecutor able to request an instruction on an offense whose elements were not charged in the indictment, this right to notice would be placed in jeopardy. Specifically, if, as mandated under the inherent relationship approach, the determination whether the offenses are sufficiently related to permit an instruction is delayed until all the evidence is developed at trial, the defendant may not have constitutionally sufficient notice to support a lesser included offense instruction requested by the prosecutor if the elements of that lesser offense are not part of the indictment. Accordingly, under the inherent relationship approach, the defendant, by in effect waiving his right to notice, may obtain a lesser offense instruction in circumstances where the constitutional restraint of notice to the defendant would prevent the prosecutor from seeking an identical instruction.[10] The elements test, in contrast, permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge. This approach preserves the mutuality implicit in the language of Rule 31(c).

Second, the history of Rule 31(c) supports the adoption of the elements approach. The Rule, which has not been amended since its adoption in 1944, is the most recent derivative of the common-law practice that permitted a jury to find a defendant "guilty of any lesser offense necessarily included in the offense charged." *Beck* v. *Alabama*, 447 U. S. 625,

[10] In *Keeble*, 412 U. S., at 214, n. 14, we acknowledged that the inherent relationship approach abandoned mutuality in the application of Rule 31(c), but we had no occasion to address the merits of the approach or to discuss whether mutuality was implicit in the language of the Rule.

633 (1980). Over a century ago, Congress codified the common law for federal criminal trials, providing in the Act of June 1, 1872, ch. 255, § 9, 17 Stat. 198, that "in all criminal causes the defendant may be found guilty of any offence the commission of which is necessarily included in that with which he is charged in the indictment." Rule 31(c) was intended to be a restatement of this "pre-existing law." See *Keeble* v. *United States*, 412 U. S. 205, 208, n. 6 (1973). Accordingly, prevailing practice at the time of the Rule's promulgation informs our understanding of its terms, and, specifically, its limitation of lesser included offenses to those "necessarily included in the offense charged."

The nature of that prevailing practice is clear. In *Giles* v. *United States*, 144 F. 2d 860 (1944), decided just three months before the adoption of Rule 31(c), the Court of Appeals for the Ninth Circuit unequivocably applied the elements test to determine the propriety of a lesser included offense instruction: "'To be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser.'" *Id.*, at 861, quoting *House* v. *State*, 186 Ind. 593, 595–596, 117 N. E. 647, 648 (1917). This approach, moreover, was applied consistently by state courts. Indeed, in *State* v. *Henry*, 98 Me. 561, 564, 57 A. 891, 892 (1904), the Supreme Judicial Court of Maine concluded that "a practically universal rule prevails, that the verdict may be for a lesser crime which is included in a greater charged in the indictment, the test being that the evidence required to establish the greater would prove the lesser offense as a necessary element." The California Supreme Court in *People* v. *Kerrick*, 144 Cal. 46, 47, 77 P. 711, 712 (1904), stated: "To be 'necessarily included' in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof." See also *State* v. *Marshall*, 206 Iowa 373, 375, 220 N. W. 106 (1928); *People ex rel. Wachowicz* v. *Martin*, 293 N. Y. 361,

364, 57 N. E. 2d 53, 54–55 (1944). This Court's decision in *Stevenson* v. *United States*, 162 U. S. 313 (1896), reflects the "practically universal" practice. There, in holding that the defendant in a murder charge was entitled to a lesser included offense instruction on manslaughter under the statutory predecessor to Rule 31(c), the Court engaged in a careful comparison of the statutory elements of murder and manslaughter to determine if the latter was a lesser included offense of the former. *Id.*, at 320. In short, the elements approach was settled doctrine at the time of the Rule's promulgation and for more than two decades thereafter. In its restatement of "pre-existing law," *Keeble* v. *United States*, 412 U. S., at 208, n. 6, Rule 31(c) incorporated this established practice.[11]

Third, the elements test is far more certain and predictable in its application than the inherent relationship approach. Because the elements approach involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial, the elements approach permits both sides to know in advance what jury instructions will be available and to plan their trial strategies accordingly. The objective elements approach, moreover, promotes judicial economy by providing a clearer rule

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[11] This Court's decisions after the adoption of Rule 31(c), while not formally adopting the elements approach, reflect adherence to it. Those decisions have focused on the statutory elements of individual offenses when considering the propriety of lesser included offense instructions. In *Keeble*, for example, we held that the defendant was entitled to an instruction on the lesser offense of simple assault:

"[A]n intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented." 412 U. S., at 213.

See also *Sansone* v. *United States*, 380 U. S. 343, 352 (1965) (analyzing the elements involved in 26 U. S. C. § 7207, and finding that they are a subset of the elements in 26 U. S. C. § 7201).

of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of inference.

The inherent relationship approach, in contrast, is rife with the potential for confusion. Finding an inherent relationship between offenses requires a determination that the offenses protect the same interests and that "in general" proof of the lesser "necessarily" involves proof of the greater. In the present case, the Court of Appeals appropriately noted: "These new layers of analysis add to the uncertainty of the propriety of an instruction in a particular case: not only are there more issues to be resolved, but correct resolution involves questions of degree and judgment, with the attendant probability that the trial and appellate courts may differ." 840 F. 2d, at 389–390. This uncertainty was illustrated here. The three judges of the original appellate panel split in their application of the inherent relationship test to the offenses of mail fraud and odometer tampering. 776 F. 2d, at 1373–1375 (opinion concurring in part and dissenting in part). In the context of rules of criminal procedure, where certainty and predictability are desired, we prefer the clearer standard for applying Rule 31(c).

IV

Turning to the facts of this case, we agree with the Court of Appeals that the elements of the offense of odometer tampering are not a subset of the elements of the crime of mail fraud. 840 F. 2d, at 386. There are two elements in mail fraud: (1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts). The offense of odometer tampering includes the element of knowingly and willfully causing an odometer to be altered. This element is not a subset of any element of mail fraud. Knowingly and willfully tampering with an odometer is not identical to devis-

ing or intending to devise a fraudulent scheme. Compare 18 U. S. C. § 1341 with 15 U. S. C. §§ 1984 and 1990c(a).

V

We conclude that Schmuck's conviction was consistent with the statutory definition of mail fraud and that he was not entitled to a lesser included offense instruction on odometer tampering. The judgment of the Court of Appeals, accordingly, is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE O'CONNOR join, dissenting.

The Court today affirms petitioner's mail fraud conviction under 18 U. S. C. § 1341. A jury found that petitioner had defrauded retail automobile purchasers by altering odometer readings on used cars and then selling the cars to unwitting dealers for resale. The scheme was a continuing one, and some dealers bought a number of the cars from petitioner over a period of time. When the dealers sold the cars, state law required them to submit title application forms to the appropriate state agency. The Court concludes that the dealers' compliance with this requirement by mail caused the scheme to constitute mail fraud, because "a failure of this passage of title would have jeopardized Schmuck's relationship of trust and goodwill with the retail dealers upon whose unwitting cooperation his scheme depended." *Ante*, at 714. In my view this is inconsistent with our prior cases' application of the statutory requirement that mailings be "for the purpose of executing" a fraudulent scheme. 18 U. S. C. § 1341.

The purpose of the mail fraud statute is "to prevent the post office from being used to carry [fraudulent schemes] into effect." *Durland* v. *United States*, 161 U. S. 306, 314 (1896); *Parr* v. *United States*, 363 U. S. 370, 389 (1960). The law does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional

hook, but reaches only "those limited instances in which the use of the mails is *a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law." *Kann* v. *United States*, 323 U. S. 88, 95 (1944) (emphasis added). In other words, it is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur—nor even by one in which a mailing predictably and necessarily occurs. The mailing must be in furtherance of the fraud.

In *Kann* v. *United States*, we concluded that even though defendants who cashed checks obtained as part of a fraudulent scheme knew that the bank cashing the checks would send them by mail to a drawee bank for collection, they did not thereby violate the mail fraud statute, because upon their receipt of the cash "[t]he scheme . . . had reached fruition," and the mailing was "immaterial . . . to any consummation of the scheme." *Id.*, at 94. We held to the same effect in *United States* v. *Maze*, 414 U. S. 395, 400–402 (1974), declining to find that credit card fraud was converted into mail fraud by the certainty that, after the wrongdoer had fraudulently received his goods and services from the merchants, they would forward the credit charges by mail for payment. These cases are squarely in point here. For though the Government chose to charge a defrauding of retail customers (to whom the innocent dealers resold the cars), it is obvious that, regardless of who the ultimate victim of the fraud may have been, the fraud was complete with respect to each car when petitioner pocketed the dealer's money. As far as each particular transaction was concerned, it was as inconsequential to him whether the dealer resold the car as it was inconsequential to the defendant in *Maze* whether the defrauded merchant ever forwarded the charges to the credit card company.

Nor can the force of our cases be avoided by combining all of the individual transactions into a single scheme, and say-

ing, as the Court does, that if the dealers' mailings obtaining title for each retail purchaser had not occurred then the dealers would have stopped trusting petitioner for future transactions. (That conclusion seems to me a non sequitur, but I accept it for the sake of argument.) This establishes, at most, that the scheme could not technically have been consummated if the mechanical step of the mailings to obtain conveyance of title had not occurred. But we have held that the indispensability of such mechanical mailings, not strictly in furtherance of the fraud, is not enough to invoke the statute. For example, when officials of a school district embezzled tax funds over the course of several years, we held that no mail fraud had occurred even though the success of the scheme plainly depended on the officials' causing tax bills to be sent by mail (and thus tax payments to be received) every year. *Parr* v. *United States*, 363 U. S., at 388–392. Similarly, when those officials caused the school district to pay by mail credit card bills—a step plainly necessary to enable their continued fraudulent use of the credit card—we concluded that no mail fraud had occurred. *Id.*, at 392–393.

I find it impossible to escape these precedents in the present case. Assuming the Court to be correct in concluding that failure to pass title to the cars would have threatened the success of the scheme, the same could have been said of failure to collect taxes or to pay the credit card bills in *Parr*. And I think it particularly significant that in *Kann* the Government proposed a theory *identical* to that which the Court today uses. Since the scheme was ongoing, the Government urged, the fact that the mailing of the two checks had occurred after the defendants had pocketed the fraudulently obtained cash made no difference. "[T]he defendants expected to receive further bonuses and profits," and therefore "the clearing of these checks in the ordinary course was essential to [the scheme's] further prosecution." 323 U. S., at 95. The dissenters in *Kann* agreed. "[T]his," they said, "was not the last step in the fraudulent scheme. It was a

continuing venture. Smooth clearances of the checks were essential lest these intermediate dividends be interrupted and the conspirators be called upon to disgorge." *Id.*, at 96 (Douglas, J., dissenting). The Court rejected this argument, concluding that "the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it." *Id.*, at 95. I think the mailing of the title application forms equivalently incidental here.

What Justice Frankfurter observed almost three decades ago remains true: "The adequate degree of relationship between a mailing which occurs during the life of a scheme and the scheme is . . . not a matter susceptible of geometric determination." *Parr* v. *United States*, *supra*, at 397 (dissenting opinion). All the more reason to adhere as closely as possible to past cases. I think we have not done that today, and thus create problems for tomorrow.

COMMISSIONER OF INTERNAL REVENUE *v.* CLARK ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87–1168. Argued November 7, 1988—Decided March 22, 1989

Under the Internal Revenue Code of 1954, gain resulting from the sale or exchange of property is generally treated as capital gain. Although the Code imposes no current tax on certain stock-for-stock exchanges, § 356(a)(1) provides that if such an exchange pursuant to a corporate reorganization plan is accompanied by a cash payment or other property—commonly referred to as "boot"—any gain which the recipient realizes from the exchange is treated in the current tax year as capital gain up to the value of the boot. However, § 356(a)(2) creates an exception, specifying that if the "exchange . . . has the effect of the distribution of a dividend," the boot must be treated as a dividend and is therefore appropriately taxed as ordinary income to the extent that gain is realized. In 1979, respondent husband (hereinafter the taxpayer), the sole shareholder of Basin Surveys, Inc. (Basin), entered into a "triangular merger" agreement with NL Industries, Inc. (NL), whereby he transferred all of Basin's outstanding shares to NL's wholly owned subsidiary in exchange for 300,000 NL shares—representing approximately 0.92% of NL's outstanding common stock—and substantial cash boot. On their 1979 joint federal income tax return, respondents reported the boot as capital gain pursuant to § 356(a)(1). Although agreeing that the merger at issue qualified as a reorganization for purposes of that section, the Commissioner of Internal Revenue assessed a deficiency against respondents, ruling that the boot payment had "the effect of the distribution of a dividend" under § 356(a)(2). On review, the Tax Court held in respondents' favor, and the Court of Appeals affirmed. Both courts rejected the test proposed by the Commissioner for determining whether a boot payment has the requisite § 356(a)(2) effect, whereby the payment would be treated as though it were made in a hypothetical redemption by the acquired corporation (Basin) immediately *prior* to the reorganization. Rather, both courts accepted and applied the postreorganization test urged by the taxpayer, which requires that a pure stock-for-stock exchange be imagined, followed immediately by a redemption of a portion of the taxpayer's shares in the acquiring corporation (NL) in return for a payment in an amount equal to the boot. The courts ruled that NL's

redemption of 125,000 of its shares from the taxpayer in exchange for the boot was subject to capital gains treatment under § 302 of the Code, which defines the tax treatment of a redemption of stock by a corporation from its shareholders.

Held: Section 356(a)'s language and history, as well as a commonsense understanding of the economic substance of the transaction at issue, establish that NL's boot payment to the taxpayer is subject to capital gains rather than ordinary income treatment. Pp. 737–745.

(a) The language of § 356(a) strongly supports the view that the question whether an "exchange . . . has the effect of the distribution of a dividend" should be answered by examining the effect of the exchange as a whole. By referring to the "exchange," both § 356(a)(2) and § 356(a)(1) plainly contemplate one integrated transaction and make clear that the character of the exchange as a whole and not simply its component parts must be examined. Moreover, the fact that § 356 expressly limits the extent to which boot may be taxed to the amount of gain realized in the reorganization suggests that Congress intended that boot not be treated in isolation from the overall reorganization. Pp. 737–738.

(b) Viewing the exchange in this case as an integrated whole, the prereorganization analogy is unacceptable, since it severs the payment of boot from the context of the reorganization, and since it adopts an overly expansive reading of § 356(a)(2) that is contrary to this Court's standard approach of construing a statutory exception narrowly to preserve the primary operation of the general rule. Pp. 738–739.

(c) The postreorganization approach is preferable and is adopted, since it does a far better job of treating the payment of boot as a component of the overall exchange. Under that approach, NL's hypothetical redemption easily satisfied § 302(b)(2), which specifies that redemptions whereby the taxpayer relinquishes more than 20% of his corporate control and thereafter retains less than 50% of the voting shares shall not be treated as dividend distributions. Pp. 739–740.

(d) The Commissioner's objection to this "recasting [of] the merger transaction" on the ground that it forces courts to find a redemption where none existed overstates the extent to which the redemption is imagined. Since a tax-free reorganization transaction is, in theory, merely a continuance of the proprietary interests in the continuing enterprise under modified corporate form, the boot-for-stock transaction can be viewed as a partial repurchase of stock by the continuing corporate enterprise—*i. e.*, as a redemption. Although both the prereorganization and postreorganization analogies "recast the transaction," the latter view at least recognizes that a reorganization has taken place. Pp. 740–741.

(e) Even if the postreorganization analogy and the principles of § 302 were abandoned in favor of a less artificial understanding of the transaction, the result would be the same. The legislative history of § 356(a)(2) suggests that Congress was primarily concerned with preventing corporations from evading tax by "siphon[ing] off" accumulated earnings and profits at a capital gains rate through the ruse of a reorganization. This purpose in turn suggests that Congress did not intend to impose ordinary income tax on boot accompanying a transaction that involves a bona fide, arm's-length exchange between unrelated parties in the context of a reorganization. In the instant transaction, there is no indication that the reorganization was used as a ruse. Thus, the boot is better characterized as part of the proceeds of a sale of stock subject to capital gains treatment than as a proxy for a dividend. Pp. 741–745.

828 F. 2d 221, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, MARSHALL, BLACKMUN, O'CONNOR, and KENNEDY, JJ., joined, and in all but Part III of which SCALIA, J., joined. WHITE, J., filed a dissenting opinion, *post*, p. 745.

Alan I. Horowitz argued the cause for petitioner. With him on the briefs were *Solicitor General Fried*, *Assistant Attorney General Rose*, *Deputy Solicitor General Wallace*, and *Ernest J. Brown*.

Walter B. Slocombe argued the cause for respondents. With him on the brief was *Daniel B. Rosenbaum*.

JUSTICE STEVENS delivered the opinion of the Court.*

This is the third case in which the Government has asked us to decide that a shareholder's receipt of a cash payment in exchange for a portion of his stock was taxable as a dividend. In the two earlier cases, *Commissioner* v. *Estate of Bedford*, 325 U. S. 283 (1945), and *United States* v. *Davis*, 397 U. S. 301 (1970), we agreed with the Government largely because the transactions involved redemptions of stock by single corporations that did not "result in a meaningful reduction of the shareholder's proportionate interest in the corporation."

*JUSTICE SCALIA joins all but Part III of this opinion.

Id., at 313. In the case we decide today, however, the taxpayer[1] in an arm's-length transaction exchanged his interest in the acquired corporation for less than 1% of the stock of the acquiring corporation and a substantial cash payment. The taxpayer held no interest in the acquiring corporation prior to the reorganization. Viewing the exchange as a whole, we conclude that the cash payment is not appropriately characterized as a dividend. We accordingly agree with the Tax Court and with the Court of Appeals that the taxpayer is entitled to capital gains treatment of the cash payment.

I

In determining tax liability under the Internal Revenue Code of 1954, gain resulting from the sale or exchange of property is generally treated as capital gain, whereas the receipt of cash dividends is treated as ordinary income.[2] The Code, however, imposes no current tax on certain stock-for-stock exchanges. In particular, § 354(a)(1) provides, subject to various limitations, for nonrecognition of gain resulting from the exchange of stock or securities solely for other stock or securities, provided that the exchange is pursuant to a plan of corporate reorganization and that the stock or securi-

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[1] Respondent Peggy S. Clark is a party to this action solely because she filed a joint federal income tax return for the year in question with her husband, Donald E. Clark. References to "taxpayer" are to Donald E. Clark.

[2] In 1979, the tax year in question, the distinction between long-term capital gain and ordinary income was of considerable importance. Most significantly, § 1202(a) of the Code, 26 U. S. C. § 1202(a) (1976 ed., Supp. III), allowed individual taxpayers to deduct 60% of their net capital gain from gross income. Although the importance of the distinction declined dramatically in 1986 with the repeal of § 1202(a), see Tax Reform Act of 1986, Pub. L. 99–514, § 301(a), 100 Stat. 2216, the distinction is still significant in a number of respects. For example, 26 U. S. C. § 1211(b) (1982 ed., Supp. IV) allows individual taxpayers to deduct capital losses to the full extent of their capital gains, but only allows them to offset up to $3,000 of ordinary income insofar as their capital losses exceed their capital gains.

ties are those of a party to the reorganization.[3] 26 U. S. C. § 354(a)(1).

Under § 356(a)(1) of the Code, if such a stock-for-stock exchange is accompanied by additional consideration in the form of a cash payment or other property—something that tax practitioners refer to as "boot"—"then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property." 26 U. S. C. § 356(a)(1). That is, if the shareholder receives boot, he or she must recognize the gain on the exchange up to the value of the boot. Boot is accordingly generally treated as a gain from the sale or exchange of property and is recognized in the current tax year.

Section 356(a)(2), which controls the decision in this case, creates an exception to that general rule. It provided in 1979:

> "If an exchange is described in paragraph (1) but has the effect of the distribution of a dividend, then there shall be treated as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after

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[3] Title 26 U. S. C. § 368(a)(1) defines several basic types of corporate reorganizations. They include, in part:

"(A) a statutory merger or consolidation;

. . . . . .

"(D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor, or one or more of its shareholders (including persons who were shareholders immediately before the transfer), or any combination thereof, is in control of the corporation to which the assets are transferred; but only if, in pursuance of the plan, stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356;

"(E) a recapitalization;

"(F) a mere change in identity, form, or place of organization of one corporation, however effected . . . ."

> February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be treated as gain from the exchange of property." 26 U. S. C. § 356 (a)(2) (1976 ed.).

Thus, if the "exchange . . . has the effect of the distribution of a dividend," the boot must be treated as a dividend and is therefore appropriately taxed as ordinary income to the extent that gain is realized. In contrast, if the exchange does not have "the effect of the distribution of a dividend," the boot must be treated as a payment in exchange for property and, insofar as gain is realized, accorded capital gains treatment. The question in this case is thus whether the exchange between the taxpayer and the acquiring corporation had "the effect of the distribution of a dividend" within the meaning of § 356(a)(2).

The relevant facts are easily summarized. For approximately 15 years prior to April 1979, the taxpayer was the president of Basin Surveys, Inc. (Basin). In January 1978, he became sole shareholder in Basin, a company in which he had invested approximately $85,000. The corporation operated a successful business providing various technical services to the petroleum industry. In 1978, N. L. Industries, Inc. (NL), a publicly owned corporation engaged in the manufacture and supply of petroleum equipment and services, initiated negotiations with the taxpayer regarding the possible acquisition of Basin. On April 3, 1979, after months of negotiations, the taxpayer and NL entered into a contract.

The agreement provided for a "triangular merger," whereby Basin was merged into a wholly owned subsidiary of NL. In exchange for transferring all of the outstanding shares in Basin to NL's subsidiary, the taxpayer elected to receive 300,000 shares of NL common stock and cash boot of $3,250,000, passing up an alternative offer of 425,000 shares of NL common stock. The 300,000 shares of NL issued to the taxpayer amounted to approximately 0.92% of the out-

standing common shares of NL. If the taxpayer had instead accepted the pure stock-for-stock offer, he would have held approximately 1.3% of the outstanding common shares. The Commissioner and the taxpayer agree that the merger at issue qualifies as a reorganization under §§ 368(a)(1)(A) and (a)(2)(D).[4]

Respondents filed a joint federal income tax return for 1979. As required by § 356(a)(1), they reported the cash boot as taxable gain. In calculating the tax owed, respondents characterized the payment as long-term capital gain. The Commissioner on audit disagreed with this characterization. In his view, the payment had "the effect of the distribution of a dividend" and was thus taxable as ordinary income up to $2,319,611, the amount of Basin's accumulated earnings and profits at the time of the merger. The Commissioner assessed a deficiency of $972,504.74.

Respondents petitioned for review in the Tax Court, which, in a reviewed decision, held in their favor. 86 T. C. 138 (1986). The court started from the premise that the question whether the boot payment had "the effect of the distribution of a dividend" turns on the choice between "two judicially articulated tests." *Id.*, at 140. Under the test advocated by the Commissioner and given voice in *Shimberg* v. *United States*, 577 F. 2d 283 (CA5 1978), cert. denied, 439 U. S. 1115 (1979), the boot payment is treated as though it were made in a hypothetical redemption by the acquired corporation (Basin) immediately *prior* to the reorganization.

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[4] Section 368(a)(2)(D) provided in 1979:

"The acquisition by one corporation, in exchange for stock of a corporation (referred to in this subparagraph as 'controlling corporation') which is in control of the acquiring corporation, of substantially all of the properties of another corporation which in the transaction is merged into the acquiring corporation shall not disqualify a transaction under paragraph (1)(A) if (i) such transaction would have qualified under paragraph (1)(A) if the merger had been into the controlling corporation, and (ii) no stock of the acquiring corporation is used in the transaction." 26 U. S. C. § 368(a)(2)(D) (1976 ed.).

Under this test, the cash payment received by the taxpayer indisputably would have been treated as a dividend.[5] The second test, urged by the taxpayer and finding support in *Wright* v. *United States*, 482 F. 2d 600 (CA8 1973), proposes an alternative hypothetical redemption. Rather than concentrating on the taxpayer's prereorganization interest in the acquired corporation, this test requires that one imagine a pure stock-for-stock exchange, followed immediately by a *post*reorganization redemption of a portion of the taxpayer's shares in the acquiring corporation (NL) in return for a payment in an amount equal to the boot. Under § 302 of the Code, which defines when a redemption of stock should be treated as a distribution of dividend, NL's redemption of 125,000 shares of its stock from the taxpayer in exchange for the $3,250,000 boot payment would have been treated as capital gain.[6]

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[5] The parties do not agree as to whether dividend equivalence for the purposes of § 356(a)(2) should be determined with reference to § 302 of the Code, which concerns dividend treatment of redemptions of stock by a single corporation outside the context of a reorganization. Compare Brief for Petitioner 28–30 with Brief for Respondents 18–24. They are in essential agreement, however, about the characteristics of a dividend. Thus, the Commissioner correctly argues that the "basic attribute of a dividend, derived from Sections 301 and 316 of the Code, is a pro rata distribution to shareholders out of corporate earnings and profits. When a distribution is made that is not a formal dividend, 'the fundamental test of dividend equivalency' is whether the distribution is proportionate to the shareholders' stock interests (*United States* v. *Davis*, 397 U. S. 301, 306 (1970))." Brief for Petitioner 7. Citing the same authority, but with different emphasis, the taxpayer argues that "the hallmark of a non-dividend distribution is a 'meaningful reduction of the shareholder's proportionate interest in the corporation.' *United States* v. *Davis*, 397 U. S. 301, 313 (1970)." Brief for Respondents 5.

Under either test, a prereorganization distribution by Basin to the taxpayer would have qualified as a dividend. Because the taxpayer was Basin's sole shareholder, any distribution necessarily would have been pro rata and would not have resulted in a "meaningful reduction of the [taxpayer's] proportionate interest in [Basin]."

[6] Section 302 provides in relevant part:

The Tax Court rejected the prereorganization test favored by the Commissioner because it considered it improper "to view the cash payment as an isolated event totally separate from the reorganization." 86 T. C., at 151. Indeed, it sug-

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"(a) General rule

"If a corporation redeems its stock (within the meaning of section 317 (b)), and if paragraph (1), (2), (3), or (4) of subsection (b) applies, such redemption shall be treated as a distribution in part or full payment in exchange for the stock.

"(b) Redemptions treated as exchanges

. . . . . .

"(2) Substantially disproportionate redemption of stock

"(A) In general

"Subsection (a) shall apply if the distribution is substantially disproportionate with respect to the shareholder.

"(B) Limitation

"This paragraph shall not apply unless immediately after the redemption the shareholder owns less than 50 percent of the total combined voting power of all classes of stock entitled to vote.

"(C) Definitions

"For purposes of this paragraph, the distribution is substantially disproportionate if—

"(i) the ratio which the voting stock of the corporation owned by the shareholder immediately after the redemption bears to all of the voting stock of the corporation at such time,

"is less than 80 percent of—

"(ii) the ratio which the voting stock of the corporation owned by the shareholder immediately before the redemption bears to all of the voting stock of the corporation at such time.

"For purposes of this paragraph, no distribution shall be treated as substantially disproportionate unless the shareholder's ownership of the common stock of the corporation (whether voting or nonvoting) after and before redemption also meets the 80 percent requirement of the preceding sentence. . . ."

As the Tax Court explained, receipt of the cash boot reduced the taxpayer's potential holdings in NL from 1.3% to 0.92%. 86 T. C. 138, 153 (1986). The taxpayer's holdings were thus approximately 71% of what they would have been absent the payment. *Ibid.* This fact, combined with the fact that the taxpayer held less than 50% of the voting stock of NL after the hypothetical redemption, would have qualified the "distribution" as "substantially disproportionate" under § 302(b)(2).

gested that this test requires that courts make the "determination of dividend equivalency fantasizing that the reorganization does not exist." *Id.*, at 150 (footnote omitted). The court then acknowledged that a similar criticism could be made of the taxpayer's contention that the cash payment should be viewed as a postreorganization redemption. It concluded, however, that since it was perfectly clear that the cash payment would not have taken place without the reorganization, it was better to treat the boot "as the equivalent of a redemption *in the course of implementing the reorganization*," than "as having occurred *prior to and separate from the reorganization.*" *Id.*, at 152 (emphasis in original).[7]

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[7]The Tax Court stressed that to adopt the prereorganization view "would in effect resurrect the now discredited 'automatic dividend rule' . . . , at least with respect to pro rata distributions made to an acquired corporation's shareholders pursuant to a plan of reorganization." 86 T. C., at 152. On appeal, the Court of Appeals agreed. 828 F. 2d 221, 226–227 (CA4 1987).

The "automatic dividend rule" developed as a result of some imprecise language in our decision in *Commissioner* v. *Estate of Bedford*, 325 U. S. 283 (1945). Although *Estate of Bedford* involved the recapitalization of a single corporation, the opinion employed broad language, asserting that "a distribution, pursuant to a reorganization, of earnings and profits 'has the effect of a distribution of a taxable dividend' within [§ 356(a)(2)]." *Id.*, at 292. The Commissioner read this language as establishing as a matter of law that all payments of boot are to be treated as dividends to the extent of undistributed earnings and profits. See Rev. Rul. 56–220, 1956–1 Cum. Bull. 191. Commentators, see, *e. g.*, Darrel, The Scope of *Commissioner* v. *Bedford Estate*, 24 Taxes 266 (1946); Shoulson, Boot Taxation: The Blunt Toe of the Automatic Rule, 20 Tax L. Rev. 573 (1965), and courts, see, *e. g.*, *Hawkinson* v. *Commissioner*, 235 F. 2d 747 (CA2 1956), however, soon came to criticize this rule. The courts have long since retreated from the "automatic dividend rule," see, *e. g.*, *Idaho Power Co.* v. *United States*, 161 F. Supp. 807 (Ct. Cl.), cert. denied, 358 U. S. 832 (1958), and the Commissioner has followed suit, see Rev. Rul. 74–515, 1974–2 Cum. Bull. 118. As our decision in this case makes plain, we agree that *Estate of Bedford* should not be read to require that all payments of boot be treated as dividends.

The Court of Appeals for the Fourth Circuit affirmed. 828 F. 2d 221 (1987). Like the Tax Court, it concluded that although "[s]ection 302 does not explicitly apply in the reorganization context," *id.*, at 223, and although § 302 differs from § 356 in important respects, *id.*, at 224, it nonetheless provides "the appropriate test for determining whether boot is ordinary income or a capital gain," *id.*, at 223. Thus, as explicated in § 302(b)(2), if the taxpayer relinquished more than 20% of his corporate control and retained less than 50% of the voting shares after the distribution, the boot would be treated as capital gain. However, as the Court of Appeals recognized, "[b]ecause § 302 was designed to deal with a stock redemption by a single corporation, rather than a reorganization involving two companies, the section does not indicate which corporation [the taxpayer] lost interest in." *Id.*, at 224. Thus, like the Tax Court, the Court of Appeals was left to consider whether the hypothetical redemption should be treated as a prereorganization distribution coming from the acquired corporation or as a postreorganization distribution coming from the acquiring corporation. It concluded:

> "Based on the language and legislative history of § 356, the change-in-ownership principle of § 302, and the need to review the reorganization as an integrated transaction, we conclude that the boot should be characterized as a post-reorganization stock redemption by N. L. that affected [the taxpayer's] interest in the new corporation. Because this redemption reduced [the taxpayer's] N. L. holdings by more than 20%, the boot should be taxed as a capital gain." *Id.*, at 224–225.

This decision by the Court of Appeals for the Fourth Circuit is in conflict with the decision of the Fifth Circuit in *Shimberg* v. *United States*, 577 F. 2d 283 (1978), in two important respects. In *Shimberg*, the court concluded that it was inappropriate to apply stock redemption principles in reorganization cases "on a wholesale basis." *Id.*, at 287; see also *ibid.*, n. 13. In addition, the court adopted the pre-

reorganization test, holding that "§ 356(a)(2) requires a determination of whether the distribution would have been taxed as a dividend if made prior to the reorganization or if no reorganization had occurred." *Id.*, at 288.

To resolve this conflict on a question of importance to the administration of the federal tax laws, we granted certiorari. 485 U. S. 933 (1988).

II

We agree with the Tax Court and the Court of Appeals for the Fourth Circuit that the question under § 356(a)(2) whether an "exchange . . . has the effect of the distribution of a dividend" should be answered by examining the effect of the exchange as a whole. We think the language and history of the statute, as well as a commonsense understanding of the economic substance of the transaction at issue, support this approach.

The language of § 356(a) strongly supports our understanding that the transaction should be treated as an integrated whole. Section 356(a)(2) asks whether "*an exchange* is described in paragraph (1)" that "has the effect of the distribution of a dividend." (Emphasis supplied.) The statute does not provide that boot shall be treated as a dividend if its payment has the effect of the distribution of a dividend. Rather, the inquiry turns on whether the "exchange" has that effect. Moreover, paragraph (1), in turn, looks to whether "the property received in *the exchange* consists not only of property permitted by section 354 or 355 to be received without the recognition of gain but also of other property or money." (Emphasis supplied.) Again, the statute plainly refers to one integrated transaction and, again, makes clear that we are to look to the character of the exchange as a whole and not simply its component parts. Finally, it is significant that § 356 expressly limits the extent to which boot may be taxed to the amount of gain realized in the reorganization. This limitation suggests that Congress intended that boot not be treated in isolation from

the overall reorganization. See Levin, Adess, & McGaffey, Boot Distributions in Corporate Reorganizations—Determination of Dividend Equivalency, 30 Tax Lawyer 287, 303 (1977).

Our reading of the statute as requiring that the transaction be treated as a unified whole is reinforced by the well-established "step-transaction" doctrine, a doctrine that the Government has applied in related contexts, see, *e. g.*, Rev. Rul. 75–447, 1975–2 Cum. Bull. 113, and that we have expressly sanctioned, see *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, 613 (1938); *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, 334 (1945). Under this doctrine, interrelated yet formally distinct steps in an integrated transaction may not be considered independently of the overall transaction. By thus "linking together all interdependent steps with legal or business significance, rather than taking them in isolation," federal tax liability may be based "on a realistic view of the entire transaction." 1 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶4.3.5, p. 4–52 (1981).

Viewing the exchange in this case as an integrated whole, we are unable to accept the Commissioner's prereorganization analogy. The analogy severs the payment of boot from the context of the reorganization. Indeed, only by straining to abstract the payment of boot from the context of the overall exchange, and thus imagining that Basin made a distribution to the taxpayer independently of NL's planned acquisition, can we reach the rather counterintuitive conclusion urged by the Commissioner—that the taxpayer suffered no meaningful reduction in his ownership interest as a result of the cash payment. We conclude that such a limited view of the transaction is plainly inconsistent with the statute's direction that we look to the effect of the entire exchange.

The prereorganization analogy is further flawed in that it adopts an overly expansive reading of § 356(a)(2). As the Court of Appeals recognized, adoption of the prereorganization approach would "result in ordinary income treatment in

most reorganizations because corporate boot is usually distributed pro rata to the shareholders of the target corporation." 828 F. 2d, at 227; see also Golub, "Boot" in Reorganizations—The Dividend Equivalency Test of Section 356(a)(2), 58 Taxes 904, 911 (1980); Note, 20 Boston College L. Rev. 601, 612 (1979). Such a reading of the statute would not simply constitute a return to the widely criticized "automatic dividend rule" (at least as to cases involving a pro rata payment to the shareholders of the acquired corporation), see n. 8, *supra*, but also would be contrary to our standard approach to construing such provisions. The requirement of § 356(a)(2) that boot be treated as dividend in some circumstances is an exception from the general rule authorizing capital gains treatment for boot. In construing provisions such as § 356, in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision. See *Phillips, Inc.* v. *Walling*, 324 U. S. 490, 493 (1945) ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people"). Given that Congress has enacted a general rule that treats boot as capital gain, we should not eviscerate that legislative judgment through an expansive reading of a somewhat ambiguous exception.

The postreorganization approach adopted by the Tax Court and the Court of Appeals is, in our view, preferable to the Commissioner's approach. Most significantly, this approach does a far better job of treating the payment of boot as a component of the overall exchange. Unlike the prereorganization view, this approach acknowledges that there would have been no cash payment absent the exchange and also that, by accepting the cash payment, the taxpayer experienced a meaningful reduction in his potential ownership interest.

Once the postreorganization approach is adopted, the result in this case is pellucidly clear. Section 302(a) of the

Code provides that if a redemption fits within any one of the four categories set out in § 302(b), the redemption "shall be treated as a distribution in part or full payment in exchange for the stock," and thus not regarded as a dividend. As the Tax Court and the Court of Appeals correctly determined, the hypothetical postreorganization redemption by NL of a portion of the taxpayer's shares satisfies at least one of the subsections of § 302(b).[8] In particular, the safe harbor provisions of subsection (b)(2) provide that redemptions in which the taxpayer relinquishes more than 20% of his or her share of the corporation's voting stock and retains less than 50% of the voting stock after the redemption shall not be treated as distributions of a dividend. See n. 6, *supra*. Here, we treat the transaction as though NL redeemed 125,000 shares of its common stock (*i. e.*, the number of shares of NL common stock forgone in favor of the boot) in return for a cash payment to the taxpayer of $3,250,000 (*i. e.*, the amount of the boot). As a result of this redemption, the taxpayer's interest in NL was reduced from 1.3% of the outstanding common stock to 0.9%. See 86 T. C., at 153. Thus, the taxpayer relinquished approximately 29% of his interest in NL and retained less than a 1% voting interest in the corporation after the transaction, easily satisfying the "substantially disproportionate" standards of § 302(b)(2). We accordingly conclude that the boot payment did not have the effect of a dividend and that the payment was properly treated as capital gain.

III

The Commissioner objects to this "recasting [of] the merger transaction into a form different from that entered

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[8] Because the mechanical requirements of subsection (b)(2) are met, we need not decide whether the hypothetical redemption might also qualify for capital gains treatment under the general "not essentially equivalent to a dividend" language of subsection (b)(1). Subsections (b)(3) and (b)(4), which deal with redemptions of all of the shareholder's stock and with partial liquidations, respectively, are not at issue in this case.

into by the parties," Brief for Petitioner 11, and argues that the Court of Appeals' formal adherence to the principles embodied in § 302 forced the court to stretch to "find a redemption to which to apply them, since the merger transaction entered into by the parties did not involve a redemption," *id.*, at 28. There are a number of sufficient responses to this argument. We think it first worth emphasizing that the Commissioner overstates the extent to which the redemption is imagined. As the Court of Appeals for the Fifth Circuit noted in *Shimberg*, "[t]he theory behind tax-free corporate reorganizations is that the transaction is merely 'a continuance of the proprietary interests in the continuing enterprise under modified corporate form.' *Lewis* v. *Commissioner of Internal Revenue*, 176 F. 2d 646, 648 (CA1 1949); Treas. Reg. § 1.368–1(b). See generally Cohen, *Conglomerate Mergers and Taxation*, 55 A. B. A. J. 40 (1969)." 577 F. 2d, at 288. As a result, the boot-for-stock transaction can be viewed as a partial repurchase of stock by the continuing corporate enterprise—*i. e.*, as a redemption. It is, of course, true that both the prereorganization and postreorganization analogies are somewhat artificial in that they imagine that the redemption occurred outside the confines of the actual reorganization. However, if forced to choose between the two analogies, the postreorganization view is the less artificial. Although both analogies "recast the merger transaction," the postreorganization view recognizes that a reorganization has taken place, while the prereorganization approach recasts the transaction to the exclusion of the overall exchange.

Moreover, we doubt that abandoning the prereorganization and postreorganization analogies and the principles of § 302 in favor of a less artificial understanding of the transaction would lead to a result different from that reached by the Court of Appeals. Although the statute is admittedly ambiguous and the legislative history sparse, we are persuaded—even without relying on § 302—that Congress did not intend to except reorganizations such as that at issue

here from the general rule allowing capital gains treatment for cash boot. 26 U. S. C. § 356(a)(1). The legislative history of § 356(a)(2), although perhaps generally "not illuminating," *Estate of Bedford*, 325 U. S., at 290, suggests that Congress was primarily concerned with preventing corporations from "siphon[ing] off" accumulated earnings and profits at a capital gains rate through the ruse of a reorganization. See Golub, 58 Taxes, at 905. This purpose is not served by denying capital gains treatment in a case such as this in which the taxpayer entered into an arm's-length transaction with a corporation in which he had no prior interest, exchanging his stock in the acquired corporation for less than a 1% interest in the acquiring corporation and a substantial cash boot.

Section 356(a)(2) finds its genesis in § 203(d)(2) of the Revenue Act of 1924. See 43 Stat. 257. Although modified slightly over the years, the provisions are in relevant substance identical. The accompanying House Report asserts that § 203(d)(2) was designed to "preven[t] evasion." H. R. Rep. No. 179, 68th Cong., 1st Sess., 15 (1924). Without further explication, both the House and Senate Reports simply rely on an example to explain, in the words of both Reports, "[t]he necessity for this provision." *Ibid.*; S. Rep. No. 398, 68th Cong., 1st Sess., 16 (1924). Significantly, the example describes a situation in which there was no change in the stockholders' relative ownership interests, but merely the creation of a wholly owned subsidiary as a mechanism for making a cash distribution to the shareholders:

> "Corporation A has capital stock of $100,000, and earnings and profits accumulated since March 1, 1913, of $50,000. If it distributes the $50,000 as a dividend to its stockholders, the amount distributed will be taxed at the full surtax rates.
>
> "On the other hand, Corporation A may organize Corporation B, to which it transfers all its assets, the consideration for the transfer being the issuance by B of all its stock and $50,000 in cash to the stockholders of Corpora-

> tion A in exchange for their stock in Corporation A. Under the existing law, the $50,000 distributed with the stock of Corporation B would be taxed, not as a dividend, but as a capital gain, subject only to the 12½ per cent rate. The effect of such a distribution is obviously the same as if the corporation had declared out as a dividend its $50,000 earnings and profits. If dividends are to be subject to the full surtax rates, then such an amount so distributed should also be subject to the surtax rates and not to the 12½ per cent rate on capital gain." *Ibid.*; H. R. Rep. No. 179, at 15.

The "effect" of the transaction in this example is to transfer accumulated earnings and profits to the shareholders without altering their respective ownership interests in the continuing enterprise.

Of course, this example should not be understood as exhaustive of the proper applications of § 356(a)(2). It is nonetheless noteworthy that neither the example, nor any other legislative source, evinces a congressional intent to tax boot accompanying a transaction that involves a bona fide exchange between unrelated parties in the context of a reorganization as though the payment was in fact a dividend. To the contrary, the purpose of avoiding tax evasion suggests that Congress did not intend to impose an ordinary income tax in such cases. Moreover, the legislative history of § 302 supports this reading of § 356(a)(2) as well. In explaining the "essentially equivalent to a dividend" language of § 302 (b)(1)—language that is certainly similar to the "has the effect . . . of a dividend" language of § 356(a)(2)—the Senate Finance Committee made clear that the relevant inquiry is "whether or not the transaction by its nature may properly be characterized as a sale of stock . . . ." S. Rep. No. 1622, 83d Cong., 2d Sess., 234 (1954); cf. *United States* v. *Davis*, 397 U. S., at 311.

Examining the instant transaction in light of the purpose of § 356(a)(2), the boot-for-stock exchange in this case "may

properly be characterized as a sale of stock." Significantly, unlike traditional single corporation redemptions and unlike reorganizations involving commonly owned corporations, there is little risk that the reorganization at issue was used as a ruse to distribute a dividend. Rather, the transaction appears in all respects relevant to the narrow issue before us to have been comparable to an arm's-length sale by the taxpayer to NL. This conclusion, moreover, is supported by the findings of the Tax Court. The court found that "[t]here is not the slightest evidence that the cash payment was a concealed distribution from BASIN." 86 T. C., at 155. As the Tax Court further noted, Basin lacked the funds to make such a distribution:

> "Indeed, it is hard to conceive that such a possibility could even have been considered, for a distribution of that amount was not only far in excess of the accumulated earnings and profits ($2,319,611), but also of the total assets of BASIN ($2,758,069). In fact, only if one takes into account unrealized appreciation in the value of BASIN's assets, including good will and/or going-concern value, can one possibly arrive at $3,250,000. Such a distribution could only be considered as the equivalent of a complete liquidation of BASIN . . . ." *Ibid.*[9]

In this context, even without relying on § 302 and the post-reorganization analogy, we conclude that the boot is better characterized as a part of the proceeds of a sale of stock than

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[9] The Commissioner maintains that Basin "could have distributed a dividend in the form of its own obligation (see, *e. g.*, I. R. C. § 312(a)(2)) or it could have borrowed funds to distribute a dividend." Reply Brief for Petitioner 7. Basin's financial status, however, is nonetheless strong support for the Tax Court's conclusion that the cash payment was not a concealed dividend.

as a proxy for a dividend. As such, the payment qualifies for capital gains treatment.

The judgment of the Court of Appeals is accordingly

Affirmed.

JUSTICE WHITE, dissenting.

The question in this case is whether the cash payment of $3,250,000 by N. L. Industries, Inc. (NL) to Donald Clark, which he received in the April 18, 1979, merger of Basin Surveys, Inc. (Basin), into N. L. Acquisition Corporation (NLAC), had the effect of a distribution of a dividend under the Internal Revenue Code of 1954, 26 U. S. C. §356(a)(2) (1976 ed.), to the extent of Basin's accumulated undistributed earnings and profits. Petitioner, the Commissioner of Internal Revenue (Commissioner), made this determination, taxing the sum as ordinary income, to find a 1979 tax deficiency of $972,504.74. The Court of Appeals disagreed, stating that because the cash payment resembles a hypothetical stock redemption from NL to Clark, the amount is taxable as capital gain. 828 F. 2d 221 (CA4 1987). Because the majority today agrees with that characterization, in spite of Clark's explicit refusal of the stock-for-stock exchange imagined by the Court of Appeals and the majority, and because the record demonstrates, instead, that the transaction before us involved a boot distribution that had "the effect of the distribution of a dividend" under §356(a)(2)—and hence properly alerted the Commissioner to Clark's tax deficiency—I dissent.

The facts are stipulated. Basin, Clark, NL, and NLAC executed an Agreement and Plan of Merger dated April 3, 1979, which provided that on April 18, 1979, Basin would merge with NLAC. The statutory merger, which occurred pursuant to §§368(a)(1)(A) and (a)(2)(D) of the Code, and therefore qualified for tax-free reorganization status under §354(a)(1), involved the following terms: Each outstanding share of NLAC stock remained outstanding; each out-

standing share of Basin common stock was exchanged for $56,034.482 cash and 5,172.4137 shares of NL common stock; and each share of Basin common stock held by Basin was canceled. NLAC's name was amended to Basin Surveys, Inc. The Secretary of State of West Virginia certified that the merger complied with West Virginia law. Clark, the owner of all 58 outstanding shares of Basin, received $3,250,000 in cash and 300,000 shares of NL stock. He expressly refused NL's alternative of 425,000 shares of NL common stock without cash. See App. 56–59.

Congress enacted § 354(a)(1) to grant favorable tax treatment to specific corporate transactions (reorganizations) that involve the exchange of stock or securities solely for other stock or securities. See *Paulsen* v. *Commissioner*, 469 U. S. 131, 136 (1985) (citing Treas. Reg. § 1.368–1(b), 26 CFR § 1.368–1(b) (1984), and noting the distinctive feature of such reorganizations, namely, continuity of interests). Clark's "triangular merger" of Basin into NL's subsidiary NLAC qualified as one such tax-free reorganization, pursuant to § 368(a)(2)(D). Because the stock-for-stock exchange was supplemented with a cash payment, however, § 356(a)(1) requires that "the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property." Because this provision permitted taxpayers to withdraw profits during corporate reorganizations without declaring a dividend, Congress enacted § 356(a)(2), which states that when an exchange has "the effect of the distribution of a dividend," boot must be treated as a dividend, and taxed as ordinary income, to the extent of the distributee's "ratable share of the undistributed earnings and profits of the corporation. . . ." *Ibid.;* see also H. R. Rep. No. 179, 68th Cong., 1st Sess., 15 (1924) (illustration of § 356(a)(2)'s purpose to frustrate evasion of dividend taxation through corporate reorganization distributions); S. Rep. No. 398, 68th Cong., 1st Sess., 16 (1924) (same).

Thus the question today is whether the cash payment to Clark had the *effect* of a distribution of a dividend. We supplied the straightforward answer in *United States* v. *Davis*, 397 U. S. 301, 306, 312 (1970), when we explained that a pro rata redemption of stock by a corporation is "essentially equivalent" to a dividend. A pro rata distribution of stock, with no alteration of basic shareholder relationships, is the hallmark of a dividend. This was precisely Clark's gain. As sole shareholder of Basin, Clark necessarily received a pro rata distribution of moneys that exceeded Basin's undistributed earnings and profits of $2,319,611. Because the merger and cash obligation occurred simultaneously on April 18, 1979, and because the statutory merger approved here assumes that Clark's proprietary interests continue in the restructured NLAC, the exact source of the pro rata boot payment is immaterial, which truth Congress acknowledged by requiring only that an exchange have the *effect* of a dividend distribution.

To avoid this conclusion, the Court of Appeals—approved by the majority today—recast the transaction as though the relevant distribution involved a single corporation's (NL's) stock redemption, which dividend equivalency is determined according to § 302 of the Code. Section 302 shields distributions from dividend taxation if the cash redemption is accompanied by sufficient loss of a shareholder's percentage interest in the corporation. The Court of Appeals hypothesized that Clark completed a pure stock-for-stock reorganization, receiving 425,000 NL shares, and thereafter redeemed 125,000 of these shares for his cash earnings of $3,250,000. The sum escapes dividend taxation because Clark's interest in NL theoretically declined from 1.3% to 0.92%, adequate to trigger § 302(b)(2) protection. Transporting § 302 from its purpose to frustrate shareholder sales of equity back to their own corporation, to § 356(a)(2)'s reorganization context, however, is problematic. Neither the majority nor the Court of Appeals explains why § 302 should obscure the core attribute

of a dividend as a pro rata distribution to a corporation's shareholders;[1] nor offers insight into the mechanics of valuing hypothetical stock transfers and equity reductions; nor answers the Commissioner's observations that the sole shareholder of an acquired corporation will always have a smaller interest in the continuing enterprise when cash payments combine with a stock exchange. Last, the majority and the Court of Appeals' recharacterization of market happenings describes the exact stock-for-stock exchange, without a cash supplement, that Clark refused when he agreed to the merger.

Because the parties chose to structure the exchange as a tax-free reorganization under § 354(a)(1), and because the pro rata distribution to Clark of $3,250,000 during this reorganization had the *effect* of a dividend under § 356(a)(2), I dissent.[2]

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[1] The Court of Appeals' zeal to excoriate the "automatic dividend rule" leads to an opposite rigidity—an automatic nondividend rule, even for pro rata boot payments. Any significant cash payment in a stock-for-stock exchange distributed to a sole shareholder of an acquired corporation will automatically receive capital gains treatment. Section 356(a)(2)'s exception for such payments that have attributes of a dividend disappears. Congress did not intend to handicap the Commissioner and courts with either absolute; instead, § 356(a)(1) instructs courts to make fact-specific inquiries into whether boot distributions accompanying corporate reorganizations occur on a pro rata basis to shareholders of the acquired corporation, and thus threaten a bailout of the transferor corporation's earnings and profits escaping a proper dividend tax treatment.

[2] The majority's alternative holding that no statutory merger occurred at all—rather a taxable sale—is difficult to understand: All parties stipulate to the merger, which, in turn, was approved under West Virginia law; and Congress endorsed exactly such tax-free corporate transactions pursuant to its § 368(a)(1) reorganization regime. However apt the speculated sale analogy may be, if the April 3 Merger Agreement amounts to a sale of Clark's stock to NL, and not the intended merger, Clark would be subject to taxation on his full gain of over $10 million. The fracas over tax treatment of the cash boot would be irrelevant.

Syllabus

UNITED STATES DEPARTMENT OF JUSTICE ET AL. *v.* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87–1379. Argued December 7, 1988—Decided March 22, 1989

On the basis of information provided by local, state, and federal law enforcement agencies, the Federal Bureau of Investigation (FBI) compiles and maintains criminal identification records or "rap sheets" on millions of persons, which contain descriptive information as well as a history of arrests, charges, convictions, and incarcerations. After the FBI denied Freedom of Information Act (FOIA) requests by respondents, a CBS news correspondent and the Reporters Committee for Freedom of the Press, they filed suit in the District Court seeking the rap sheet for one Charles Medico insofar as it contained "matters of public record." Since the Pennsylvania Crime Commission had identified Medico's family company as a legitimate business dominated by organized crime figures, and since the company allegedly had obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman, respondents asserted that a record of financial crimes by Medico would potentially be a matter of public interest. Petitioner Department of Justice responded that it had no record of such crimes, but refused to confirm or deny whether it had any information concerning nonfinancial crimes by Medico. The court granted summary judgment for the Department, holding, *inter alia*, that the rap sheet was protected by Exemption 7(C) of the FOIA, which excludes from that statute's disclosure requirements records or information compiled for law enforcement purposes "to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." The Court of Appeals reversed and remanded, holding, among other things, that district courts should limit themselves in this type of case to making the factual determination whether the subject's legitimate privacy interest in his rap sheet is outweighed by the public interest in disclosure because the original information appears on the public record.

Held: Disclosure of the contents of an FBI rap sheet to a third party "could reasonably be expected to constitute an unwarranted invasion of

personal privacy" within the meaning of Exemption 7(C) and therefore is prohibited by that Exemption. Pp. 762–780.

(a) Medico's interest in the nondisclosure of any rap sheet the FBI might have on him is the sort of "personal privacy" interest that Congress intended the Exemption to protect. Pp. 762–771.

(b) Whether disclosure of a private document is "warranted" within the meaning of the Exemption turns upon the nature of the requested document and its relationship to the FOIA's central purpose of exposing to public scrutiny official information that sheds light on an agency's performance of its statutory duties, rather than upon the particular purpose for which the document is requested or the identity of the requesting party. The statutory purpose is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. Pp. 771–775.

(c) In balancing the public interest in disclosure against the interest Congress intended Exemption 7(C) to protect, a categorical decision is appropriate and individual circumstances may be disregarded when a case fits into the genus in which the balance characteristically tips in one direction. Cf. *FTC* v. *Grolier Inc.*, 462 U. S. 19, 27–28; *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 224. *Id.*, at 223–224, disapproved to the extent that it read the Exemption's "*an* unwarranted invasion" phrase to require ad hoc balancing. Where, as here, the subject of a rap sheet is a private citizen and the information is in the Government's control as a compilation, rather than as a record of what the Government is up to, the privacy interest in maintaining the rap sheet's "practical obscurity" is always at its apex while the FOIA-based public interest in disclosure is at its nadir. Thus, as a categorical matter, rap sheets are excluded from disclosure by the Exemption in such circumstances. Pp. 776–780.

259 U. S. App. D. C. 426, 816 F. 2d 730, and 265 U. S. App. D. C. 365, 831 F. 2d 1124, reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, MARSHALL, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which BRENNAN, J., joined, *post*, p. 780.

Roy T. Englert, Jr., argued the cause for petitioners. With him on the briefs were *Solicitor General Fried, Assistant Attorney General Bolton, Deputy Solicitor General Cohen, Leonard Schaitman*, and *John F. Daly*.

Kevin T. Baine argued the cause for respondents. With him on the brief was *Paul Mogin.**

JUSTICE STEVENS delivered the opinion of the Court.

The Federal Bureau of Investigation (FBI) has accumulated and maintains criminal identification records, sometimes referred to as "rap sheets," on over 24 million persons. The question presented by this case is whether the disclosure of the contents of such a file to a third party "could reasonably be expected to constitute an unwarranted invasion of personal privacy" within the meaning of the Freedom of Information Act (FOIA), 5 U. S. C. §552(b)(7)(C) (1982 ed., Supp. V).

I

In 1924 Congress appropriated funds to enable the Department of Justice (Department) to establish a program to collect and preserve fingerprints and other criminal identification records. 43 Stat. 217. That statute authorized the Department to exchange such information with "officials of States, cities and other institutions." *Ibid.* Six years later Congress created the FBI's identification division, and gave it responsibility for "acquiring, collecting, classifying, and preserving criminal identification and other crime records and the exchanging of said criminal identification records with the duly authorized officials of governmental agencies,

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**Robert R. Belair* and *Cathy Cravens Snell* filed a brief for Search Group, Inc., et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Newspaper Publishers Association et al. by *Richard J. Ovelmen* and *Laura Besvinick;* for the National Association of Retired Federal Employees by *Joseph B. Scott* and *Michael J. Kator;* and for Public Citizen et al. by *Patti A. Goldman, Alan B. Morrison,* and *Eric R. Glitzenstein.*

Briefs of *amici curiae* were filed for the State of California by *John K. Van de Kamp,* Attorney General, *N. Eugene Hill,* Assistant Attorney General, *Paul H. Dobson,* Supervising Deputy Attorney General, and *Ramon M. de la Guardia,* Deputy Attorney General; and for the American Civil Liberties Union by *John A. Powell.*

of States, cities, and penal institutions." Ch. 455, 46 Stat. 554 (codified at 5 U. S. C. § 340 (1934 ed.)); see 28 U. S. C. § 534(a)(4) (providing for exchange of rap-sheet information among "authorized officials of the Federal Government, the States, cities, and penal and other institutions"). Rap sheets compiled pursuant to such authority contain certain descriptive information, such as date of birth and physical characteristics, as well as a history of arrests, charges, convictions, and incarcerations of the subject. Normally a rap sheet is preserved until its subject attains age 80. Because of the volume of rap sheets, they are sometimes incorrect or incomplete and sometimes contain information about other persons with similar names.

The local, state, and federal law enforcement agencies throughout the Nation that exchange rap-sheet data with the FBI do so on a voluntary basis. The principal use of the information is to assist in the detection and prosecution of offenders; it is also used by courts and corrections officials in connection with sentencing and parole decisions. As a matter of executive policy, the Department has generally treated rap sheets as confidential and, with certain exceptions, has restricted their use to governmental purposes. Consistent with the Department's basic policy of treating these records as confidential, Congress in 1957 amended the basic statute to provide that the FBI's exchange of rap-sheet information with any other agency is subject to cancellation "if dissemination is made outside the receiving departments or related agencies." 71 Stat. 61; see 28 U. S. C. § 534(b).

As a matter of Department policy, the FBI has made two exceptions to its general practice of prohibiting unofficial access to rap sheets. First, it allows the subject of a rap sheet to obtain a copy, see 28 CFR §§ 16.30–16.34 (1988); and second, it occasionally allows rap sheets to be used in the preparation of press releases and publicity designed to assist in the apprehension of wanted persons or fugitives. See § 20.33(a)(4).

In addition, on three separate occasions Congress has expressly authorized the release of rap sheets for other limited purposes. In 1972 it provided for such release to officials of federally chartered or insured banking institutions and "if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employment and licensing . . . ." 86 Stat. 1115. In 1975, in an amendment to the Securities Exchange Act of 1934, Congress permitted the Attorney General to release rap sheets to self-regulatory organizations in the securities industry. See 15 U. S. C. § 78q(f)(2) (1982 ed., Supp V). And finally, in 1986 Congress authorized release of criminal-history information to licensees or applicants before the Nuclear Regulatory Commission. See 42 U. S. C. § 2169(a). These three targeted enactments—all adopted after the FOIA was passed in 1966—are consistent with the view that Congress understood and did not disapprove the FBI's general policy of treating rap sheets as nonpublic documents.

Although much rap-sheet information is a matter of public record, the availability and dissemination of the actual rap sheet to the public is limited. Arrests, indictments, convictions, and sentences are public events that are usually documented in court records. In addition, if a person's entire criminal history transpired in a single jurisdiction, all of the contents of his or her rap sheet may be available upon request in that jurisdiction. That possibility, however, is present in only three States.[1] All of the other 47 States place substantial restrictions on the availability of criminal-history summaries even though individual events in those summaries are matters of public record. Moreover, even in Florida, Wisconsin, and Oklahoma, the publicly available

[1] See Fla. Stat. § 943.053(3) (1987); Wis. Stat. § 19.35 (1987–1988); and Okla. Stat., Tit. 51, § 24A.8 (Supp. 1988).

summaries may not include information about out-of-state arrests or convictions.[2]

II

The statute known as the FOIA is actually a part of the Administrative Procedure Act (APA). Section 3 of the APA as enacted in 1946 gave agencies broad discretion concerning the publication of governmental records.[3] In 1966 Congress amended that section to implement "'a general philosophy of full agency disclosure.'"[4] The amendment required agencies to publish their rules of procedure in the Federal Register, 5 U. S. C. § 552(a)(1)(C), and to make available for public inspection and copying their opinions, statements of policy, interpretations, and staff manuals and instructions that are not published in the Federal Register, § 552(a)(2). In addition, § 552(a)(3) requires every agency "upon any request for

[2] The brief filed on behalf of Search Group, Inc., and other *amici curiae* contains the following summary description of the dissemination policies in 47 States:

"Conviction data, although generally unavailable to the public, is often available to governmental non-criminal justice agencies and even private employers. In general, conviction data is far more available outside the criminal justice system than is nonconviction data. By contrast, in all 47 states nonconviction data cannot be disclosed at all for non-criminal justice purposes, or may be disclosed only in narrowly defined circumstances, for specified purposes." Brief for Search Group, Inc., et al. as *amici curiae* 40 (footnotes omitted); see also Brief for Petitioner 27, n. 13.

A number of States, while requiring disclosure of police blotters and event-based information, deny the public access to personal arrest data such as rap sheets. See *Houston Chronicle Publishing Co.* v. *Houston*, 531 S. W. 2d 177 (Tex. Civ. App. 1975), aff'd, 536 S. W. 2d 559 (Tex. 1976); *Stephens* v. *Van Arsdale*, 227 Kan. 676, 608 P. 2d 972 (1980).

[3] "The section was plagued with vague phrases, such as that exempting from disclosure 'any function of the United States requiring secrecy in the public interest.' Moreover, even 'matters of official record' were only to be made available to 'persons properly and directly concerned' with the information. And the section provided no remedy for wrongful withholding of information." *EPA* v. *Mink*, 410 U. S. 73, 79 (1973).

[4] *Department of Air Force* v. *Rose*, 425 U. S. 352, 360 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)).

records which . . . reasonably describes such records" to make such records "promptly available to any person."[5] If an agency improperly withholds any documents, the district court has jurisdiction to order their production. Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden "on the agency to sustain its action" and directs the district courts to "determine the matter de novo."[6]

Congress exempted nine categories of documents from the FOIA's broad disclosure requirements. Three of those exemptions are arguably relevant to this case. Exemption 3 applies to documents that are specifically exempted from disclosure by another statute. § 552(b)(3). Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." § 552(b)(6).[7] Exemption

[5] Title 5 U. S. C. § 552(a)(3) provides:

"Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."

[6] Section 552(a)(4)(B) provides:

"(B) On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."

[7] Congress employed similar language earlier in the statute to authorize an agency to delete identifying details that might otherwise offend an individual's privacy:

"To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction." § 552(a)(2).

7(C) excludes records or information compiled for law enforcement purposes, "but only to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." § 552(b)(7)(C).

Exemption 7(C)'s privacy language is broader than the comparable language in Exemption 6 in two respects. First, whereas Exemption 6 requires that the invasion of privacy be "clearly unwarranted," the adverb "clearly" is omitted from Exemption 7(C). This omission is the product of a 1974 amendment adopted in response to concerns expressed by the President.[8] Second, whereas Exemption 6 refers to disclosures that "would constitute" an invasion of privacy, Exemption 7(C) encompasses any disclosure that "could reasonably be expected to constitute" such an invasion. This difference is also the product of a specific amendment.[9] Thus, the standard for evaluating a threatened invasion of privacy interests resulting from the disclosure of records compiled for law enforcement purposes is somewhat broader than the standard applicable to personnel, medical, and similar files.

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[8] See 120 Cong. Rec. 33158–33159 and 34162–34163 (1974).

[9] See 132 Cong. Rec. 27189 and 31414–31415 (1986). Although the move from the "would constitute" standard to the "could reasonably be expected to constitute" standard represents a considered congressional effort "to ease considerably a Federal law enforcement agency's burden in invoking [Exemption 7]," *id.*, at 31424, there is no indication that the shift was intended to eliminate *de novo* review in favor of agency deference in Exemption 7(C) cases. Rather, although district courts still operate under the general *de novo* review standard of 5 U. S. C. § 552(a)(4)(B), in determining the impact on personal privacy from disclosure of law enforcement records or information, the stricter standard of whether such disclosure "would" constitute an unwarranted invasion of such privacy gives way to the more flexible standard of whether such disclosure "could reasonably be expected to" constitute such an invasion.

III

This case arises out of requests made by a CBS news correspondent and the Reporters Committee for Freedom of the Press (respondents) for information concerning the criminal records of four members of the Medico family. The Pennsylvania Crime Commission had identified the family's company, Medico Industries, as a legitimate business dominated by organized crime figures. Moreover, the company allegedly had obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman.

The FOIA requests sought disclosure of any arrests, indictments, acquittals, convictions, and sentences of any of the four Medicos. Although the FBI originally denied the requests, it provided the requested data concerning three of the Medicos after their deaths. In their complaint in the District Court, respondents sought the rap sheet for the fourth, Charles Medico (Medico), insofar as it contained "matters of public record." App. 33.

The parties filed cross-motions for summary judgment. Respondents urged that any information regarding "a record of bribery, embezzlement or other financial crime" would potentially be a matter of special public interest. *Id.*, at 97. In answer to that argument, the Department advised respondents and the District Court that it had no record of any financial crimes concerning Medico, but the Department continued to refuse to confirm or deny whether it had any information concerning nonfinancial crimes. Thus, the issue was narrowed to Medico's nonfinancial-crime history insofar as it is a matter of public record.

The District Court granted the Department's motion for summary judgment, relying on three separate grounds. First, it concluded that 28 U. S. C. § 534, the statute that authorizes the exchange of rap-sheet information with other official agencies, also prohibits the release of such information to members of the public, and therefore that Exemption 3

was applicable.[10] Second, it decided that files containing rap sheets were included within the category of "personnel and medical files and similar files the disclosure of which would constitute an unwarranted invasion of privacy," and therefore that Exemption 6 was applicable. The term "similar files" applied because rap-sheet information "is personal to the individual named therein." App. to Pet. for Cert. 56a. After balancing Medico's privacy interest against the public interest in disclosure, the District Court concluded that the invasion of privacy was "clearly unwarranted."[11] Finally, the court held that the rap sheet was also protected by Ex-

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[10] "The duty to compile such records is set forth in 28 U. S. C. § 534. That section provides that the Attorney General is to 'acquire, collect, classify, and preserve identification, criminal identification, crime and other records' and that he is to 'exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.' Significantly, however, the section goes on to provide that '[t]he exchange of records authorized by [the section] is subject to cancellation if dissemination is made outside the receiving departments or related agencies.' Section 534(b).

"This Court is satisfied that pursuant to the above section, the information acquired and collected by the Attorney General may be released only to the agencies, organizations or states set forth in that section, and may not be released to the general public. Thus, the information is '[s]pecifically exempted from disclosure by statute [28 U. S. C. § 534]' which 'requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue.' The Court therefore concludes that if the defendants have collected and maintained a rap sheet related to Charles Medico, that rap sheet is exempt from disclosure pursuant to Exemption 3." App. to Pet. for Cert. 55a.

[11] "It seems highly unlikely that information about offenses which may have occurred 30 or 40 years ago, as in the case of William Medico, would have any relevance or public interest. The same can be said for information relating to the arrest or conviction of persons for minor criminal offenses or offenses which are completely unrelated to anything now under consideration by the plaintiffs. That information is personal to the third party (Charles Medico), and it if *[sic]* exists, its release would constitute 'a clearly unwarranted invasion of personal privacy.' The Court concludes therefore that those documents and that information are exempt from disclosure pursuant to 5 U. S. C. § 552(b)(6) and (7)(C)." *Id.*, at 57a.

emption 7(C), but it ordered the Department to file a statement containing the requested data *in camera* to give it an opportunity to reconsider the issue if, after reviewing that statement, such action seemed appropriate. After the Department made that filing, the District Court advised the parties that it would not reconsider the matter, but it did seal the *in camera* submission and make it part of the record on appeal.

The Court of Appeals reversed. 259 U. S. App. D. C. 426, 816 F. 2d 730 (1987). It held that an individual's privacy interest in criminal-history information that is a matter of public record was minimal at best. Noting the absence of any statutory standards by which to judge the public interest in disclosure, the Court of Appeals concluded that it should be bound by the state and local determinations that such information should be made available to the general public. Accordingly, it held that Exemptions 6 and 7(C) were inapplicable. It also agreed with respondents that Exemption 3 did not apply because 28 U. S. C. § 534 did not qualify as a statute "specifically" exempting rap sheets from disclosure.

In response to rehearing petitions advising the court that, contrary to its original understanding, most States had adopted policies of refusing to provide members of the public with criminal-history summaries, the Court of Appeals modified its holding. 265 U. S. App. D. C. 365, 831 F. 2d 1124 (1987). With regard to the public interest side of the balance, the court now recognized that it could not rely upon state policies of disclosure. However, it adhered to its view that federal judges are not in a position to make "idiosyncratic" evaluations of the public interest in particular disclosures, see 259 U. S. App. D. C., at 437, 816 F. 2d, at 741; instead, it directed district courts to consider "the general disclosure policies of the statute." 265 U. S. App. D. C., at 367, 831 F. 2d, at 1126. With regard to the privacy interest in nondisclosure of rap sheets, the court told the District Court "only to make a factual determination in these kinds of

cases: Has a legitimate privacy interest of the subject in his rap sheets faded because they appear on the public record?" *Id.*, at 368, 831 F. 2d, at 1127. In accordance with its initial opinion, it remanded the case to the District Court to determine whether the withheld information is publicly available at its source, and if so, whether the Department might satisfy its statutory obligation by referring respondents to the enforcement agency or agencies that had provided the original information.

Although he had concurred in the Court of Appeals' original disposition, Judge Starr dissented, expressing disagreement with the majority on three points. First, he rejected the argument that there is no privacy interest in "cumulative, indexed, computerized" data simply because the underlying information is on record at local courthouses or police stations:

> "As I see it, computerized data banks of the sort involved here present issues considerably more difficult than, and certainly very different from, a case involving the source records themselves. This conclusion is buttressed by what I now know to be the host of state laws requiring that cumulative, indexed criminal history information be kept confidential, as well as by general Congressional indications of concern about the privacy implications of computerized data banks. *See* H. R. Rep. No. 1416, 93d Cong., 2d Sess. 3, 6–9 (1974), *reprinted in Legislative History of the Privacy Act of 1974, Source Book on Privacy*, 296, 299–302 (1974)." *Id.*, at 369, 831 F. 2d, at 1128.

Second, Judge Starr concluded that the statute required the District Court to make a separate evaluation of the public interest in disclosure depending upon the kind of use that would be made of the information and the identity of the subject:

> "Although there may be no public interest in disclosure of the FBI rap sheet of one's otherwise inconspicuously anonymous next-door neighbor, there may be a significant public interest—one that overcomes the substantial privacy interest at stake—in the rap sheet of a public figure or an official holding high governmental office. For guidance in fleshing out that analysis, it seems sensible to me to draw upon the substantial body of defamation law dealing with 'public personages.'" *Id.*, at 370, 831 F. 2d, at 1129.

Finally, he questioned the feasibility of requiring the Department to determine the availability of the requested material at its source, and expressed concern that the majority's approach departed from the original purpose of the FOIA and threatened to convert the Federal Government into a clearinghouse for personal information that had been collected about millions of persons under a variety of different situations:

> "We are now informed that many federal agencies collect items of information on individuals that are ostensibly matters of public record. For example, Veterans Administration and Social Security records include birth certificates, marriage licenses, and divorce decrees (which may recite findings of fault); the Department of Housing and Urban Development maintains data on millions of home mortgages that are presumably 'public records' at county clerks' offices. . . . Under the majority's approach, in the absence of state confidentiality laws, there would appear to be a virtual per se rule requiring all such information to be released. The federal government is thereby transformed in one fell swoop into *the* clearinghouse for highly personal information, releasing records on any person, to any requester, for any purpose. This Congress did not intend." *Id.*, at 371, 831 F. 2d, at 1130 (emphasis in original).

The Court of Appeals denied rehearing en banc, with four judges dissenting. App. to Pet. for Cert. 64a–66a. Because of the potential effect of the Court of Appeals' opinion on values of personal privacy, we granted certiorari. 485 U. S. 1005 (1988). We now reverse.[12]

IV

Exemption 7(C) requires us to balance the privacy interest in maintaining, as the Government puts it, the "practical obscurity" of the rap sheets against the public interest in their release.

The preliminary question is whether Medico's interest in the nondisclosure of any rap sheet the FBI might have on him is the sort of "personal privacy" interest that Congress intended Exemption 7(C) to protect.[13] As we have pointed out before, "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Whalen* v. *Roe*, 429 U. S. 589, 598–600 (1977) (footnotes omitted). Here, the former interest, "in avoiding disclosure of personal matters," is implicated. Because events summarized in a rap sheet have been previously disclosed to the public, respondents contend that Medico's privacy interest in avoiding disclosure of a federal compilation of these events

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[12] Because Exemption 7(C) covers this case, there is no occasion to address the application of Exemption 6.

[13] The question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution. See, *e. g.*, *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975) (Constitution prohibits State from penalizing publication of name of deceased rape victim obtained from public records); *Paul* v. *Davis*, 424 U. S. 693, 712–714 (1976) (no constitutional privacy right affected by publication of name of arrested but untried shoplifter).

approaches zero. We reject respondents' cramped notion of personal privacy.

To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another.[14] Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private.[15] According to Webster's initial definition, information may be classified as "private" if it is "intended for or restricted to

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[14] See Karst, "The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data, 31 Law & Contemp. Prob. 342, 343–344 (1966) ("Hardly anyone in our society can keep altogether secret very many facts about himself. Almost every such fact, however personal or sensitive, is known to someone else. Meaningful discussion of privacy, therefore, requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure").

[15] See Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 198 (1890–1891) ("The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. . . . [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them"). The common law recognized that one did not necessarily forfeit a privacy interest in matters made part of the public record, albeit the privacy interest was diminished and another who obtained the facts from the public record might be privileged to publish it. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S., at 494–495 ("[T]he interests in privacy *fade* when the information involved already appears on the public record") (emphasis supplied). See also Restatement (Second) of Torts § 652D, pp. 385–386 (1977) ("[T]here is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of his birth . . . . On the other hand, if the record is one not open to public inspection, as in the case of income tax returns, it is not public and there is an invasion of privacy when it is made so"); W. Keeton, D. Dobbs, R. Keeton, & D. Owens, Prosser & Keeton on Law of Torts § 117, p. 859 (5th ed. 1984) ("[M]erely because [a fact] can be found in a public recor[d] does not mean that it should receive widespread publicity if it does not involve a matter of public concern").

the use of a particular person or group or class of persons: not freely available to the public."[16] Recognition of this attribute of a privacy interest supports the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole. The very fact that federal funds have been spent to prepare, index, and maintain these criminal-history files demonstrates that the individual items of information in the summaries would not otherwise be "freely available" either to the officials who have access to the underlying files or to the general public. Indeed, if the summaries were "freely available," there would be no reason to invoke the FOIA to obtain access to the information they contain. Granted, in many contexts the fact that information is not freely available is no reason to exempt that information from a statute generally requiring its dissemination. But the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

This conclusion is supported by the web of federal statutory and regulatory provisions that limits the disclosure of

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[16] See Webster's Third New International Dictionary 1804 (1976). See also A. Breckenridge, The Right to Privacy 1 (1970) ("Privacy, in my view, is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others. . . . It is also the individual's right to control dissemination of information about himself"); A. Westin, Privacy and Freedom 7 (1967) ("Privacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others"); Project, Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971, 1225 (1974–1975) ("[T]he right of privacy is the right to control the flow of information concerning the details of one's individuality").

rap-sheet information. That is, Congress has authorized rap-sheet dissemination to banks, local licensing officials, the securities industry, the nuclear-power industry, and other law enforcement agencies. See *supra*, at 752–753. Further, the FBI has permitted such disclosure to the subject of the rap sheet and, more generally, to assist in the apprehension of wanted persons or fugitives. See *supra*, at 752. Finally, the FBI's exchange of rap-sheet information "is subject to cancellation if dissemination is made outside the receiving departments or related agencies." 28 U. S. C. § 534(b). This careful and limited pattern of authorized rap-sheet disclosure fits the dictionary definition of privacy as involving a restriction of information "to the use of a particular person or group or class of persons." Moreover, although perhaps not specific enough to constitute a statutory exemption under FOIA Exemption 3, 5 U. S. C. § 552(b)(3),[17] these statutes and regulations, taken as a whole, evidence a congressional intent to protect the privacy of rap-sheet subjects, and a concomitant recognition of the power of compilations to affect personal privacy that outstrips the combined power of the bits of information contained within.

Other portions of the FOIA itself bolster the conclusion that disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind. Specifically, the FOIA provides that "[t]o the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction." 5 U. S. C. § 552(a)(2). Additionally, the FOIA assures that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under [§ (b)]." 5 U. S. C.

[17] The Court of Appeals reversed the District Court's holding in favor of petitioners on the Exemption 3 issue, and petitioners do not renew their Exemption 3 argument before this Court. See Pet. for Cert. 6, n. 1.

§ 552(b) (1982 ed., Supp. V). These provisions, for deletion of identifying references and disclosure of segregable portions of records with exempt information deleted, reflect a congressional understanding that disclosure of records containing personal details about private citizens can infringe significant privacy interests.[18]

Also supporting our conclusion that a strong privacy interest inheres in the nondisclosure of compiled computerized information is the Privacy Act of 1974, codified at 5 U. S. C. § 552a (1982 ed. and Supp. V). The Privacy Act was passed largely out of concern over "the impact of computer data banks on individual privacy." H. R. Rep. No. 93–1416, p. 7 (1974). The Privacy Act provides generally that "[n]o agency shall disclose any record which is contained in a system of records . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U. S. C. § 552a(b) (1982 ed., Supp. V). Although the Privacy Act contains a variety of excep-

[18] See S. Rep. No. 813, 89th Cong., 1st Sess., 7 (1965) ("The authority to delete identifying details after written justification is necessary in order to be able to balance the public's right to know with the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public. For example, it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs; but it is not necessary that the identity of any person so affected be made public"); H. R. Rep. No. 1497, 89th Cong., 2d Sess., 8 (1966) ("The public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public"). Both public relief and income tax assessments—like law enforcement—are proper subjects of public concern. But just as the identity of the individuals given public relief or involved in tax matters is irrelevant to the public's understanding of the Government's operation, so too is the identity of individuals who are the subjects of rap sheets irrelevant to the public's understanding of the system of law enforcement. For rap sheets reveal only the dry, chronological, personal history of individuals who have had brushes with the law, and tell us nothing about matters of substantive law enforcement policy that are properly the subject of public concern.

tions to this rule, including an exemption for information required to be disclosed under the FOIA, see 5 U. S. C. § 552a(b)(2), Congress' basic policy concern regarding the implications of computerized data banks for personal privacy is certainly relevant in our consideration of the privacy interest affected by dissemination of rap sheets from the FBI computer.

Given this level of federal concern over centralized data bases, the fact that most States deny the general public access to their criminal-history summaries should not be surprising. As we have pointed out, see *supra*, at 753, and n. 2, in 47 States nonconviction data from criminal-history summaries are not available at all, and even conviction data are "generally unavailable to the public." See n. 2, *supra*. State policies, of course, do not determine the meaning of a federal statute, but they provide evidence that the law enforcement profession generally assumes—as has the Department of Justice—that individual subjects have a significant privacy interest in their criminal histories. It is reasonable to presume that Congress legislated with an understanding of this professional point of view.

In addition to the common-law and dictionary understandings, the basic difference between scattered bits of criminal history and a federal compilation, federal statutory provisions, and state policies, our cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public. Most apposite for present purposes is our decision in *Department of Air Force* v. *Rose*, 425 U. S. 352 (1976). New York University law students sought Air Force Academy Honor and Ethics Code case summaries for a law review project on military discipline. The Academy had already publicly posted these summaries on 40 squadron bulletin boards, usually with identifying names redacted (names were posted for cadets who were found guilty and who left the Academy), and with instructions that cadets should read

the summaries only if necessary. Although the opinion dealt with Exemption 6's exception for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and our opinion today deals with Exemption 7(C), much of our discussion in *Rose* is applicable here. We explained that the FOIA permits release of a segregable portion of a record with other portions deleted, and that *in camera* inspection was proper to determine whether parts of a record could be released while keeping other parts secret. See *id.*, at 373–377; 5 U. S. C. §§ 552(b) and (a)(4)(B) (1982 ed. and Supp. V). We emphasized the FOIA's segregability and *in camera* provisions in order to explain that the case summaries, *with identifying names redacted*, were generally disclosable. We then offered guidance to lower courts in determining whether disclosure of all or part of such case summaries would constitute a "clearly unwarranted invasion of personal privacy" under Exemption 6:

> "Respondents sought only such disclosure as was consistent with [the Academy tradition of keeping identities confidential within the Academy]. Their request for access to summaries 'with personal references or other identifying information deleted,' respected the confidentiality interests embodied in Exemption 6. As the Court of Appeals recognized, however, what constitutes identifying information regarding a subject cadet must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar, as fellow cadets or Academy staff, with other aspects of his career at the Academy. Despite the summaries' distribution within the Academy, many of this group with earlier access to summaries may never have identified a particular cadet, or may have wholly forgotten his encounter with Academy discipline. And the risk to the privacy interests of a former cadet, particularly one who has remained in the military, posed by his

> identification by otherwise unknowing former colleagues or instructors cannot be rejected as trivial. We nevertheless conclude that consideration of the policies underlying the Freedom of Information Act, to open public business to public view when no 'clearly unwarranted' invasion of privacy will result, requires affirmance of the holding of the Court of Appeals . . . that although 'no one can guarantee that all those who are "in the know" will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty,' it sufficed to protect privacy at this stage in these proceedings by enjoining the District Court . . . that if in its opinion deletion of personal references and other identifying information 'is not sufficient to safeguard privacy, then the summaries should not be disclosed to [respondents].'" 425 U. S., at 380–381.

See also *id.*, at 387–388 (BLACKMUN, J., dissenting); *id.*, at 389–390 (REHNQUIST, J., dissenting). In this passage we doubly stressed the importance of the privacy interest implicated by disclosure of the case summaries. First: We praised the Academy's tradition of protecting personal privacy through redaction of names from the case summaries. But even with names redacted, subjects of such summaries can often be identified through other, disclosed information. So, second: *Even though the summaries, with only names redacted, had once been public*, we recognized the potential invasion of privacy through later recognition of identifying details, and approved the Court of Appeals' rule permitting the District Court to delete "other identifying information" in order to safeguard this privacy interest. If a cadet has a privacy interest in past discipline that was once public but may have been "wholly forgotten," the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten.

We have also recognized the privacy interest in keeping personal facts away from the public eye. In *Whalen* v. *Roe*,

429 U. S. 589 (1977), we held that "the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market." *Id.*, at 591. In holding only that the Federal Constitution does not *prohibit* such a compilation, we recognized that such a centralized computer file posed a "threat to privacy":

> "We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in privacy." *Id.*, at 605 (footnote omitted); see also *id.*, at 607 (BRENNAN, J., concurring) ("The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information . . .").

In sum, the fact that "an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." Rehnquist, Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1, p. 13 (Sept. 26–27,

1974). The privacy interest in a rap sheet is substantial. The substantial character of that interest is affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains age 80, when the FBI's rap sheets are discarded.

V

Exemption 7(C), by its terms, permits an agency to withhold a document only when revelation "could reasonably be expected to constitute an *unwarranted* invasion of personal privacy." We must next address what factors might *warrant* an invasion of the interest described in Part IV, *supra*.

Our previous decisions establish that whether an invasion of privacy is *warranted* cannot turn on the purposes for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request. Thus, although the subject of a presentence report can waive a privilege that might defeat a third party's access to that report, *United States Department of Justice* v. *Julian*, 486 U. S. 1, 13–14 (1988), and although the FBI's policy of granting the subject of a rap sheet access to his own criminal history is consistent with its policy of denying access to all other members of the general public, see *supra*, at 752, the rights of the two press respondents in this case are no different from those that might be asserted by any other third party, such as a neighbor or prospective employer. As we have repeatedly stated, Congress "clearly intended" the FOIA "to give any member of the public as much right to disclosure as one with a special interest [in a particular document]." *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 149 (1975); see *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214, 221 (1978); *FBI* v. *Abramson*, 456 U. S. 615 (1982). As Profes-

sor Davis explained: "The Act's sole concern is with what must be made public or not made public."[19]

Thus whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" *Department of Air Force* v. *Rose*, 425 U. S., at 372, rather than on the particular purpose for which the document is being requested. In our leading case on the FOIA, we declared that the Act was designed to create a broad right of access to "official information." *EPA* v. *Mink*, 410 U. S. 73, 80 (1973).[20] In his dissent in that case, Justice Douglas characterized the philosophy of the statute by quoting this comment by Henry Steele Commager:

> "'The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted

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[19] Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 765 (1966–1967), quoted in JUSTICE SCALIA's dissenting opinion in *United States Department of Justice* v. *Julian*, 486 U. S. 1, 17 (1988).

[20] Cf. Easterbrook, Privacy and the Optimal Extent of Disclosure Under the Freedom of Information Act, 9 J. Legal Studies 775, 777 (1980) ("The act's indexing and reading-room rules indicate that the primary objective is the elimination of 'secret law.' Under the FOIA an agency must disclose its rules governing relationships with private parties and its demands on private conduct"); Kronman, The Privacy Exemption to the Freedom of Information Act, 9 J. Legal Studies 727, 733 (1980) ("The act's first and most obvious goal (reflected in its basic disclosure requirements) is to promote honesty and reduce waste in government by exposing official conduct to public scrutiny"); Comment, The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974, 11 Harv. Civ. Rights–Civ. Lib. L. Rev. 596, 608 (1976) ("No statement was made in Congress that the Act was designed for a broader purpose such as making the government's collection of data available to anyone who has any socially useful purpose for it. For example, it was never suggested that the FOIA would be a boon to academic researchers, by eliminating their need to assemble on their own data which the government has already collected").

> to know *what their government is up to.*'" *Id.*, at 105 (quoting from The New York Review of Books, Oct. 5, 1972, p. 7) (emphasis added).

This basic policy of "'full agency disclosure unless information is exempted under clearly delineated statutory language,'" *Department of Air Force* v. *Rose*, 425 U. S., at 360–361 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case—and presumably in the typical case in which one private citizen is seeking information about another—the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

The point is illustrated by our decision in *Rose*, *supra*. As discussed earlier, we held that the FOIA required the United States Air Force to honor a request for *in camera* submission of disciplinary-hearing summaries maintained in the Academy's Honors and Ethics Code reading files. The summaries obviously contained information that would explain how the disciplinary procedures actually functioned and therefore were an appropriate subject of a FOIA request. All parties, however, agreed that the files should be redacted by deleting information that would identify the particular cadets to whom the summaries related. The deletions were unquestionably appropriate because the names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code; leaving the identifying material in the summaries would therefore have been a "clearly un-

warranted" invasion of individual privacy. If, instead of seeking information about the Academy's own conduct, the requests had asked for specific files to obtain information about the persons to whom those files related, the public interest that supported the decision in *Rose* would have been inapplicable. In fact, we explicitly recognized that "the basic purpose of the [FOIA is] to open agency action to the light of public scrutiny." *Id.*, at 372.

Respondents argue that there is a twofold public interest in learning about Medico's past arrests or convictions: He allegedly had improper dealings with a corrupt Congressman, and he is an officer of a corporation with defense contracts. But if Medico has, in fact, been arrested or convicted of certain crimes, that information would neither aggravate nor mitigate his allegedly improper relationship with the Congressman; more specifically, it would tell us nothing directly about the character of the *Congressman's* behavior. Nor would it tell us anything about the conduct of the *Department of Defense* (DOD) in awarding one or more contracts to the Medico Company. Arguably a FOIA request to the DOD for records relating to those contracts, or for documents describing the agency's procedures, if any, for determining whether officers of a prospective contractor have criminal records, would constitute an appropriate request for "official information." Conceivably Medico's rap sheet would provide details to include in a news story, but, in itself, this is not the kind of public interest for which Congress enacted the FOIA. In other words, although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropri-

ate to order a Government agency to honor a FOIA request for information about a particular private citizen.[21]

What we have said should make clear that the public interest in the release of any rap sheet on Medico that may exist is not the type of interest protected by the FOIA. Medico may or may not be one of the 24 million persons for whom the FBI has a rap sheet. If respondents are entitled to have the FBI tell them what it knows about Medico's criminal history, any other member of the public is entitled to the same disclosure—whether for writing a news story, for deciding whether to employ Medico, to rent a house to him, to extend credit to him, or simply to confirm or deny a suspicion. There is, unquestionably, *some* public interest in providing interested citizens with answers to their questions about Medico. But that interest falls outside the ambit of the public interest that the FOIA was enacted to serve.

Finally, we note that Congress has provided that the standard fees for production of documents under the FOIA shall be waived or reduced "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U. S. C. § 552(a)(4)(A)(iii) (1982 ed., Supp. V). Although such a provision obviously implies that there will be requests that do not meet such a "public interest" standard, we think it relevant to today's inquiry regarding the public interest in release of rap sheets on private citizens that Congress once again expressed the core purpose of the FOIA as "contribut[ing] significantly to public understanding *of the operations or activities of the government.*"

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[21] In fact, in at least three cases we have specifically *rejected* requests for information about private citizens. See *CIA* v. *Sims*, 471 U. S. 159 (1985); *FBI* v. *Abramson*, 456 U. S. 615 (1982); *United States Department of State* v. *Washington Post Co.*, 456 U. S. 595 (1982).

VI

Both the general requirement that a court "shall determine the matter de novo" and the specific reference to an "unwarranted" invasion of privacy in Exemption 7(C) indicate that a court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect. Although both sides agree that such a balance must be undertaken, *how* such a balance should be done is in dispute. The Court of Appeals majority expressed concern about assigning federal judges the task of striking a proper case-by-case, or ad hoc, balance between individual privacy interests and the public interest in the disclosure of criminal-history information without providing those judges standards to assist in performing that task. Our cases provide support for the proposition that categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction. The point is well illustrated by both the majority and dissenting opinions in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U. S. 214 (1978).

In *Robbins*, the majority held that Exemption 7(A), which protects from disclosure law enforcement records or information that "could reasonably be expected to interfere with enforcement proceedings," applied to statements of witnesses whom the National Labor Relations Board (NLRB or Board) intended to call at an unfair-labor-practice hearing. Although we noted that the language of Exemptions 7(B), (C), and (D) seems to contemplate a case-by-case showing "that the factors made relevant by the statute are present in each distinct situation," *id.*, at 223; see *id.*, at 234, we concluded that Exemption 7(A) "appears to contemplate that certain generic determinations might be made." *Id.*, at 224. Thus, our ruling encompassed the entire category of NLRB witness statements, and a concurring opinion pointed out that the category embraced enforcement proceedings by other agen-

cies as well. See *id.*, at 243 (STEVENS, J., concurring). In his partial dissent, Justice Powell endorsed the Court's "generic" approach to the issue, *id.*, at 244; he agreed that "the congressional requirement of a specific showing of harm does not prevent determinations of likely harm with respect to prehearing release of particular categories of documents." *Id.*, at 249. In his view, however, the exempt category should have been limited to statements of witnesses who were currently employed by the respondent. To be sure, the majority opinion in *Robbins* noted that the phrases "'a person,'" "'an unwarranted invasion,'" and "'a confidential source,'" in Exemptions 7(B), (C), and (D), respectively, seem to imply a need for an individualized showing in every case (whereas the plural "'enforcement proceedings'" in Exemption 7(A) implies a categorical determination). See *id.*, at 223–224. But since only an Exemption 7(A) question was presented in *Robbins*, we conclude today, upon closer inspection of Exemption 7(C), that for an appropriate class of law enforcement records or information a categorical balance may be undertaken there as well.[22]

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[22] Our willingness to permit categorical balancing in *Robbins* itself was a departure from earlier dicta. In *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132, 162–165 (1975), we decided not to decide an Exemption 7 issue. In so doing, we responded to the NLRB General Counsel's argument that "once a certain *type* of document is determined to fall into the category of 'investigatory files' the courts are not to inquire whether the disclosure of the *particular* document in question would contravene any of the purposes of Exemption 7." *Id.*, at 163 (emphases in original). In other words, the General Counsel argued for categorical balancing throughout Exemption 7. We rejected this argument: "The legislative history clearly indicates that Congress disapproves of those cases, relied on by the General Counsel, . . . which relieve the Government of the obligation to show that disclosure of a particular investigatory file would contravene the purposes of Exemption 7." *Id.*, at 164. The legislative history cited, S. Conf. Rep. No. 93–1200 (1974), is in fact not clear on the question whether categorical balancing may be appropriate in Exemption 7 or elsewhere. In 1986, moreover, Congress amended Exemption 7(C) to give the Government greater flexibility in responding to FOIA requests for law enforcement records or in-

First: A separate discussion in *Robbins* applies properly to Exemption 7(C) as well as to Exemption 7(A). Respondent had argued that "because FOIA expressly provides for disclosure of segregable portions of records and for *in camera* review of documents, and because the statute places the burden of justifying nondisclosure on the Government, 5 U. S. C. §§ 552(a)(4)(B), (b) (1976 ed.), the Act necessarily contemplates that the Board must specifically demonstrate in each case that disclosure of the particular witness' statement would interfere with a pending enforcement proceeding." 437 U. S., at 224. We rejected this argument, holding instead that these provisions could equally well apply to categorical balancing. This holding—that the provisions regarding segregability, *in camera* inspections, and burden of proof do not by themselves mandate case-by-case balancing—is a general one that applies to all exemptions.

Second: Although *Robbins* noted that Exemption 7(C) speaks of "*an* unwarranted invasion of personal privacy" (emphasis added), we do not think that the Exemption's use of the singular mandates ad hoc balancing. The Exemption in full provides: "This section does not apply to matters that are—records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of per-

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formation. Whereas previously the Government was required to show that disclosure of a law enforcement record "would" constitute an unwarranted invasion of personal privacy, under amended Exemption 7(C) the Government need only establish that production "could reasonably be expected" to cause such an invasion. The amendment was originally proposed by the Senate which intended to replace a focus on the effect of a particular disclosure "with a standard of reasonableness . . . based on an objective test." S. Rep. No. 98–221, p. 24 (1983). This reasonableness standard, focusing on whether disclosure of a particular type of document would tend to cause an unwarranted invasion of privacy, amply supports a categorical approach to the balance of private and public interests in Exemption 7(C).

sonal privacy." Just as one can ask whether a particular rap sheet is a "law enforcement record" that meets the requirements of this Exemption, so too can one ask whether rap sheets in general (or at least on private citizens) are "law enforcement records" that meet the stated criteria. If it is always true that the damage to a private citizen's privacy interest from a rap sheet's production outweighs the FOIA-based public value of such disclosure, then it is perfectly appropriate to conclude as a categorical matter that "production of such [rap sheets] could reasonably be expected to constitute an unwarranted invasion of personal privacy." In sum, *Robbins*' focus on the singular "an" in the phrase "an unwarranted invasion of personal privacy" is not a sufficient reason to hold that Exemption 7(C) requires ad hoc balancing.

Third: In *FTC* v. *Grolier Inc.*, 462 U. S. 19 (1983), we also supported categorical balancing. Respondent sought FTC documents concerning an investigation of a subsidiary. At issue were seven documents that would normally be exempt from disclosure under Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U. S. C. § 552(b)(5). The Court of Appeals held that four of the documents "could not be withheld on the basis of the work-product rule unless the Commission could show that 'litigation related to the terminated action exists or potentially exists.'" 462 U. S., at 22. We reversed, concluding that even if in some instances civil-discovery rules would permit such disclosure, "[s]uch materials are . . . not 'routinely' or 'normally' available to parties in litigation and hence are exempt under Exemption 5." *Id.*, at 27. We added that "[t]his result, *by establishing a discrete category of exempt information*, implements the congressional intent to provide 'workable' rules. . . . Only by construing the Exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered." *Id.*, at 27–28 (emphasis added).

Finally: The privacy interest in maintaining the practical obscurity of rap-sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir. See Parts IV and V, *supra*. Such a disparity on the scales of justice holds for a class of cases without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided. Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted." The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring in the judgment.

I concur in the result the Court reaches in this case, but I cannot follow the route the Court takes to reach that result. In other words, the Court's use of "categorical balancing" under Exemption 7(C), I think, is not basically sound. Such a bright-line rule obviously has its appeal, but I wonder whether it would not run aground on occasion, such as in a situation where a rap sheet discloses a congressional candidate's conviction of tax fraud five years before. Surely, the FBI's disclosure of that information could not "reasonably be expected" to constitute an invasion of personal privacy, much less an unwarranted invasion, inasmuch as the candidate relinquished any interest in preventing the dissemination of this information when he chose to run for Congress.

In short, I do not believe that Exemption 7(C)'s language and its legislative history, or the case law, support interpreting that provision as exempting *all* rap-sheet information from the FOIA's disclosure requirements. See H. R. Rep. No. 1497, 89th Cong., 2d Sess., 11 (1966); S. Rep. No. 813, 89th Cong., 1st Sess., 3, 9 (1965); *Department of Air Force* v. *Rose*, 425 U. S. 352, 372 (1976); *Lesar* v. *United States Dept. of Justice*, 204 U. S. App. D. C. 200, 214, n. 80, 636 F. 2d 472, 486, n. 80 (1980).

It might be possible to mount a substantial argument in favor of interpreting Exemption 3 and 28 U. S. C. § 534 as exempting all rap-sheet information from the FOIA, especially in the light of the presence of the three post-FOIA enactments the Court mentions, *ante*, at 753. But the federal parties before this Court have abandoned the Exemption 3 issue they presented to the Court of Appeals and lost, and it perhaps would be inappropriate for us to pursue an inquiry along this line in the present case.

For these reasons, I would not adopt the Court's bright-line approach but would leave the door open for the disclosure of rap-sheet information in some circumstances. Nonetheless, even a more flexible balancing approach would still require reversing the Court of Appeals in this case. I, therefore, concur in the judgment, but do not join the Court's opinion.

TEXAS STATE TEACHERS ASSOCIATION ET AL. *v.* GARLAND INDEPENDENT SCHOOL DISTRICT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-1759. Argued March 1, 1989—Decided March 28, 1989

Petitioners, state and local teachers' associations and several of their members and employees, brought suit in the District Court under 42 U. S. C. § 1983, alleging that respondent school district's policy of prohibiting communications by or with teachers during the schoolday concerning employee organizations violated their First and Fourteenth Amendment rights in various particular respects. The District Court granted the school district summary judgment on most of petitioners' claims. The Court of Appeals affirmed in part and reversed in part, granting petitioners summary judgment on their claims that the school district's actions in prohibiting teacher-to-teacher discussion of employee organizations during the schoolday and teacher use of internal mail and billboard facilities to discuss such organizations were unconstitutional. After this Court summarily affirmed the Court of Appeals' judgment, petitioners filed the instant application for an award of attorney's fees under 42 U. S. C. § 1988. The District Court held that petitioners were not "prevailing parties" within the meaning of § 1988 and thus were ineligible for any fee award, since, under Fifth Circuit precedent, the test for prevailing party status was whether the plaintiff prevailed on *the central issue* in the litigation by acquiring the primary relief sought. The Court of Appeals affirmed, ruling that, although petitioners had achieved success on "significant secondary issues," they had not prevailed on the central issue in the lawsuit—the constitutionality of the school district's policy of limiting employee organizations' access to teachers and school facilities during school hours.

Held:

1. The lower courts' "central issue" test for determining "prevailing party" status under § 1988 is rejected in favor of a standard requiring only that parties " 'succeed on any significant issue in the litigation which achieves some of the benefit [they] sought in bringing the suit.' " *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 278-279, quoted in *Hensley* v. *Eckerhart*, 461 U. S. 424, 433. Pp. 788-793.

(a) The "central issue" test is directly contrary to the thrust of *Hensley*, *supra*, which, although it did not adopt one particular standard

for determining prevailing party status, nevertheless indicated that the *degree* of the plaintiff's success in relation to the lawsuit's overall goals is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all. The "central issue" test is also incongruous in light of the clear congressional intent, as expressed in § 1988's legislative history, that interim fee awards be available to partially prevailing civil rights plaintiffs. Congress cannot have meant "prevailing party" status to depend entirely on the timing of a fee request: A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation. Furthermore, the search for the "central" and "tangential" issues in the lawsuit, or for the "primary" as opposed to the "secondary" relief sought, forces district courts to focus on the subjective intent of the parties, which is almost impossible to determine; is irrelevant to § 1988's prime purposes and essentially unhelpful in defining the term "prevailing party"; and is sure to provoke prolonged litigation of fee disputes. Pp. 788–791.

(b) A plaintiff has crossed the threshold to a fee award of some kind if he or she satisfies the *Nadeau* "significant issue"—"some benefit" standard. Under that standard, at a minimum, the plaintiff must be able to point to a resolution of the dispute which materially alters the parties' legal relationship in a manner which Congress sought to promote in the fee statute. *Hewitt* v. *Helms*, 482 U. S. 755, 760. Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that it is so insignificant as to be insufficient to support prevailing party status. However, where the parties' relationship has been materially changed, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, *supra*, not to the availability of the fee award *vel non*. Pp. 791–793.

2. Petitioners are "prevailing parties" within the meaning of § 1988. They have prevailed on a significant issue in the litigation, in that their success has materially altered the school district's policy limiting the rights of teachers to communicate with each other concerning employee organizations and union activities. Moreover, they have obtained some of the relief they sought, a judgment vindicating the rights of public employees in the workplace. They have thus served the "private attorney general" role which Congress meant to promote in enacting § 1988. P. 793.

837 F. 2d 190, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Robert H. Chanin argued the cause for petitioners. With him on the briefs was *Jeremiah A. Collins*.

Earl Luna argued the cause for respondents. With him on the brief was *Mary Milford*.

JUSTICE O'CONNOR delivered the opinion of the Court.

We must decide today the proper standard for determining whether a party has "prevailed" in an action brought under certain civil rights statutes such that the party is eligible for an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988. This is an issue which has divided the Courts of Appeals both before and after our decision in *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). The Courts of Appeals for the Fifth and Eleventh Circuits require that a party succeed on the "central issue" in the litigation and achieve the "primary relief sought" to be eligible for an award of attorney's fees under § 1988. See, *e. g.*, *Simien* v. *San Antonio*, 809 F. 2d 255, 258 (CA5 1987); *Martin* v. *Heckler*, 773 F. 2d 1145, 1149 (CA11 1985) (en banc). Most of the other Federal Courts of Appeals have applied a less demanding standard, requiring only that a party succeed on a significant issue and receive some of the relief sought in the lawsuit to qualify for a fee award. See, *e. g.*, *Gingras* v. *Lloyd*, 740 F. 2d 210, 212 (CA2 1984); *Lampher* v. *Zagel*, 755 F. 2d 99, 102 (CA7 1985); *Fast* v. *School Dist. of Ladue*, 728 F. 2d 1030, 1032–1033 (CA8 1984) (en banc); *Lummi Indian Tribe* v. *Oltman*, 720 F. 2d 1124, 1125 (CA9 1983); *Nephew* v. *Aurora*, 766 F. 2d 1464, 1466 (CA10 1985). In this case, the Court of Appeals for the Fifth Circuit applied the "central issue" test and concluded that petitioners here were not prevailing parties under § 1988. Because of the conflicting views in the Courts of Appeals, and because of the importance of the definition of the term "prevailing party" to the application of § 1988 and other federal fee shifting statutes, we granted certiorari. 488 U. S. 815 (1988).

I

On March 31, 1981, petitioners, the Texas State Teachers Association, its local affiliate the Garland Education Association, and several individual members and employees of both organizations brought suit under 42 U. S. C. § 1983 against respondent Garland Independent School District and various school district officials. Petitioners' complaint alleged that the school district's policy of prohibiting communications by or with teachers during the schoolday concerning employee organizations violated petitioners' First and Fourteenth Amendment rights. In particular, petitioners focused their attack on the school district's Administrative Regulation 412, which prohibits employee organizations access to school facilities during school hours and proscribes the use of school mail and internal communications systems by employee organizations. The school district's regulations do permit employee organizations to meet with, or recruit, teachers on school premises before or after the schoolday "upon request and approval by the local school principal." Brief for Respondents 4–5.

On cross motions for summary judgment, the District Court rejected petitioners' claims in almost all respects. The court found that under *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983), the prohibitions on union access to teachers themselves and to internal communication media during school hours were constitutional. App. to Pet. for Cert. 55a–57a. The District Court also rejected petitioners' claim that the school district's policies were unconstitutional in that they prohibited teachers' discussion or promotion of employee organizations among themselves during school hours. *Id.*, at 46a, n. 13. As to teacher discussion of employee organizations, the court found that even if some school officials interpreted the regulations to prohibit such speech, there had been no attempt to enforce such an interpretation. As to teacher-to-teacher speech promoting employee organizations, the court found that the record indicated that the school district did prohibit such speech, but

concluded that this prohibition was constitutional. *Ibid.* The District Court did find for petitioners on one issue: it held that the requirement of school principal approval of teacher meetings with union representatives after school hours was unconstitutionally vague in that no guidelines limited the discretion of the principal's decision to grant or deny access to the campus. *Id.*, at 58a. The District Court found that this issue was of "minor significance," since there was no evidence in the record to indicate that school officials had ever denied employee organizations the use of school premises during nonschool hours. *Id.*, at 58a, 60a, n. 26.

On appeal, the Court of Appeals for the Fifth Circuit affirmed in part, reversed in part, and remanded. *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 777 F. 2d 1046 (1985). The Court of Appeals agreed with the District Court that petitioners' claim that the First Amendment required the school district to allow union representatives access to school facilities during school hours was foreclosed by our decision in *Perry*. The Court of Appeals affirmed the entry of summary judgment for the school district on this claim. *Id.*, at 1050–1053. The Court of Appeals, however, disagreed with the District Court's analysis of petitioners' claims relating to teacher-to-teacher discussion of employee organizations during the schoolday. It found that the prohibition of teacher speech promoting union activity during school hours was unconstitutional. *Id.*, at 1054. It also found that there was a distinct possibility that the school district would discipline teachers who engaged in *any* discussion of employee organizations during the schoolday, and that such a policy had a chilling effect on teachers' First Amendment rights. Finally, the Court of Appeals held that the prohibition on teacher use of internal mail and billboard facilities to discuss employee organizations was unconstitutional. The school district allowed teachers to use these facilities for personal messages of all kinds, and the school district had not shown that the discussion of union activity in these

media would be disruptive of its educative mission. *Id.*, at 1055. As to these claims, the Court of Appeals granted petitioners' motion for summary judgment. Respondents filed an appeal in this Court, and we summarily affirmed the judgment of the Court of Appeals. See *Garland Independent School Dist.* v. *Texas State Teachers Assn.*, 479 U. S. 801 (1986).

Petitioners then filed the instant application for an award of attorney's fees pursuant to 42 U. S. C. § 1988. The District Court found that under Fifth Circuit precedent petitioners here were not "prevailing parties" within the meaning of § 1988 and thus were ineligible for any fee award. App. to Pet. for Cert. 16a–20a. The court recognized that petitioners had achieved "partial success," but indicated that "[i]n this circuit the test for prevailing party status is whether the plaintiff prevailed on *the central issue* by acquiring the primary relief sought." *Id.*, at 17a, quoting *Simien* v. *San Antonio*, 809 F. 2d, at 258. Looking to "the background of the lawsuit" and the claims presented in petitioners' complaint, the District Court concluded that the central issue in this litigation was the constitutionality of the school district's policy of limiting employee organizations' access to teachers and school facilities during school hours. App. to Pet. for Cert. 19a. Because petitioners did not prevail on this issue, they had not carried the "central issue" in the lawsuit nor achieved "the primary relief sought" and were therefore precluded from recovering attorney's fees.

A divided panel of the Court of Appeals for the Fifth Circuit affirmed the District Court's judgment denying petitioners prevailing party status under § 1988. 837 F. 2d 190 (1988). The majority noted that the Fifth Circuit's "definition of 'prevailing party' is narrower than some of the other Federal appellate courts." *Id.*, at 192. Applying that definition here, the majority found that while petitioners "did succeed on significant secondary issues," the "main thrust" of their lawsuit was nonetheless the desire to gain access to

school campuses during school hours for outside representatives of employee organizations. *Id.*, at 192–193. Thus, under the "central issue" test, the District Court had correctly concluded that petitioners were not prevailing parties eligible for a fee award under § 1988. Judge Goldberg dissented. He argued that the "central issue" test for determining prevailing party status was inconsistent with the congressional purpose in enacting § 1988 and contrary to the decisions of this Court. *Id.*, at 193–197. We now reverse the judgment of the Court of Appeals.

II

As amended, 42 U. S. C. § 1988, provides in pertinent part:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

In *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983), we dealt with the application of the attorney's fee provision of § 1988 to a situation much like the one before us today. Respondents in *Hensley* were patients involuntarily confined in a state mental hospital who brought a broad based challenge to the constitutionality of a number of the institution's rules and practices. In five of the six general areas where respondents challenged the institution's practices, the District Court found that conditions fell below those required by the Constitution and granted respondents relief. Respondents then requested a fee award pursuant to § 1988, and the District Court "determined that respondents were prevailing parties under 42 U. S. C. § 1988 even though they had not succeeded on every claim." *Id.*, at 428. With one exception, the District Court awarded the respondents in *Hensley* the entire "lodestar" figure, that is, the hours expended in litigation

multiplied by a reasonable hourly rate. The Court of Appeals affirmed the fee award.

In *Hensley* this Court sought to clarify "the proper standard for setting a fee award where the plaintiff has achieved only limited success." *Id.*, at 431. At the outset we noted that no fee award is permissible until the plaintiff has crossed the "statutory threshold" of prevailing party status. In this regard, the Court indicated that "[a] typical formulation is that 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit.'" *Id.*, at 433, quoting *Nadeau* v. *Helgemoe*, 581 F. 2d 275, 278–279 (CA1 1978). The Court then went on to establish certain principles to guide the discretion of the lower courts in setting fee awards in cases where plaintiffs have not achieved complete success. Where the plaintiff's claims are based on different facts and legal theories, and the plaintiff has prevailed on only some of those claims, we indicated that "[t]he congressional intent to limit [fee] awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Hensley*, *supra*, at 435. In the more typical situation, where the plaintiff's claims arise out of a common core of facts, and involve related legal theories, the inquiry is more complex. In such a case, we indicated that "the most critical factor is the degree of success obtained." 461 U. S., at 436. We noted that in complex civil rights litigation, "the plaintiff often may succeed in identifying some unlawful practices or conditions," but that "the range of possible success is vast," and the achievement of prevailing party status alone "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." *Ibid.* We indicated that the district courts should exercise their equitable discretion in such cases to arrive at a reasonable fee award, either by attempt-

ing to identify specific hours that should be eliminated or by simply reducing the award to account for the limited success of the plaintiff. *Id.*, at 437. See also *Blanchard* v. *Bergeron*, 489 U. S. 87, 96 (1989).

We think it clear that the "central issue" test applied by the lower courts here is directly contrary to the thrust of our decision in *Hensley*. Although respondents are correct in pointing out that *Hensley* did not adopt one particular standard for determining prevailing party status, *Hensley* does indicate that the *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all.

Our decision in *Hensley* is consistent with congressional intent in this regard. Congress clearly contemplated that interim fee awards would be available "where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues." S. Rep. No. 94–1011, p. 5 (1976); see also H. R. Rep. No. 94–1558, p. 8 (1976). In discussing the availability of fees *pendente lite* under § 1988, we have indicated that such awards are proper where a party "has established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal." *Hanrahan* v. *Hampton*, 446 U. S. 754, 757 (1980). The incongruence of the "central issue" test in light of the clear congressional intent that interim fee awards be available to partially prevailing civil rights plaintiffs is readily apparent. In this case, our summary affirmance of the Court of Appeals' judgment for respondents on the union access issues and for petitioners on the teacher-to-teacher communication issues effectively ended the litigation. Because the Court of Appeals found that petitioners had not succeeded on what it viewed as the central issue in the suit, no fees were awarded. Yet, if petitioners' victory on the teacher-to-teacher communication issue had been only an interim one, with other issues remanded for further proceed-

ings in the District Court, petitioners would have been entitled to some fee award for their successful claims under § 1988. Congress cannot have meant "prevailing party" status to depend entirely on the timing of a request for fees: A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation.

Nor does the central issue test have much to recommend it from the viewpoint of judicial administration of § 1988 and other fee shifting provisions. By focusing on the subjective importance of an issue to the litigants, it asks a question which is almost impossible to answer. Is the "primary relief sought" in a disparate treatment action under Title VII reinstatement, backpay, or injunctive relief? This question, the answer to which appears to depend largely on the mental state of the parties, is wholly irrelevant to the purposes behind the fee shifting provisions, and promises to mire district courts entertaining fee applications in an inquiry which two commentators have described as "excruciating." See M. Schwartz & J. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees § 15.11, p. 348 (1986). Creating such an unstable threshold to fee eligibility is sure to provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension. In sum, the search for the "central" and "tangential" issues in the lawsuit, or for the "primary," as opposed to the "secondary," relief sought, much like the search for the golden fleece, distracts the district court from the primary purposes behind § 1988 and is essentially unhelpful in defining the term "prevailing party."

We think the language of *Nadeau* v. *Helgemoe*, quoted in our opinion in *Hensley*, adequately captures the inquiry which should be made in determining whether a civil rights plaintiff is a prevailing party within the meaning of § 1988. If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties

sought in bringing suit," the plaintiff has crossed the threshold to a fee award of some kind. *Nadeau*, 581 F. 2d, at 278–279. The floor in this regard is provided by our decision in *Hewitt* v. *Helms*, 482 U. S. 755 (1987). As we noted there, "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.*, at 760. Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. *Id.*, at 760–761; *Rhodes* v. *Stewart*, 488 U. S. 1, 3–4 (1988). Beyond this absolute limitation, a technical victory may be so insignificant, and may be so near the situations addressed in *Hewitt* and *Rhodes*, as to be insufficient to support prevailing party status. For example, in the context of this litigation, the District Court found that the requirement that nonschool hour meetings be conducted only with prior approval from the local school principal was unconstitutionally vague. App. to Pet. for Cert. 58a. The District Court characterized this issue as "of minor significance" and noted that there was "no evidence that the plaintiffs were ever refused permission to use school premises during non-school hours." *Id.*, at 60a, n. 26. If this had been petitioners' only success in the litigation, we think it clear that this alone would not have rendered them "prevailing parties" within the meaning of § 1988. Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the "generous formulation" we adopt today has not been satisfied. See *Nadeau*, 581 F. 2d, at 279, n. 3; *New York City Unemployed and Welfare Council* v. *Brezenoff*, 742 F. 2d 718, 724, n. 4 (CA2 1984); *Chicano Police Officer's Assn.* v. *Stover*, 624 F. 2d 127, 131 (CA10 1980) ("Nuisance settlements, of course, should not give rise to a 'prevailing' plaintiff"). The touchstone of the prevailing party inquiry must be the material alteration of the legal re-

lationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award *vel non*.

III

Application of the principles enunciated above to the case at hand is not difficult. Petitioners here obtained a judgment vindicating the First Amendment rights of public employees in the workplace. Their success has materially altered the school district's policy limiting the rights of teachers to communicate with each other concerning employee organizations and union activities. Petitioners have thus served the "private attorney general" role which Congress meant to promote in enacting § 1988. They prevailed on a significant issue in the litigation and have obtained some of the relief they sought and are thus "prevailing parties" within the meaning of § 1988. We therefore reverse the judgment of the Court of Appeals and remand this case for a determination of a reasonable attorney's fee consistent with the principles established by our decision in *Hensley* v. *Eckerhart*.

It is so ordered.

MIDLAND ASPHALT CORP. ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 87–1905. Argued January 17, 1989—Decided March 28, 1989

Petitioners moved to dismiss a federal indictment against them on the ground, *inter alia*, that the prosecution had violated Federal Rule of Criminal Procedure 6(e)(2)—which generally prohibits public disclosure by Government attorneys of "matters occurring before the grand jury"—by filing, in a separate criminal case, a memorandum disclosing matters before the grand jury in this case. After the District Court denied the motion, the Court of Appeals granted the Government's motion to dismiss petitioners' appeal for lack of jurisdiction on the ground that the District Court's order was not an immediately appealable "final decision" under 28 U. S. C. § 1291. The court rejected petitioners' contention that *United States* v. *Mechanik*, 475 U. S. 66, which held that an alleged violation of Rule 6(d) was rendered harmless beyond a reasonable doubt by a petit jury's guilty verdict, would render orders of this sort "effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468, and immediately appealable under the collateral order exception to the final judgment rule.

Held: A district court order denying a defendant's motion to dismiss an indictment for an alleged violation of Rule 6(e) is not immediately appealable under § 1291. Since petitioners have not yet been sentenced, the District Court's order is not a final judgment ending the litigation on the merits. Moreover, whatever view is taken of the scope of *Mechanik* (an issue not resolved here), an order such as that at issue does not satisfy the stringent requirements of the *Coopers & Lybrand* test. There is no merit in petitioners' contention that such orders are "effectively unreviewable" once trial has been held because they pertain to a right not merely not to be convicted, but a right *not to be tried at all*. Neither the text of Rule 6(e) nor the Grand Jury Clause of the Fifth Amendment affords a right not to be tried (in the sense relevant for the collateral order doctrine) in the event of a violation of grand jury secrecy. Pp. 798–802.

840 F. 2d 1040, affirmed.

SCALIA, J., delivered the opinion for a unanimous Court.

Richard J. Braun argued the cause for petitioners. With him on the brief was *Leslie M. Greenbaum.*

Lawrence S. Robbins argued the cause for the United States. With him on the brief were *Solicitor General Fried, Assistant Attorney General Rule, Deputy Solicitor General Bryson, Deputy Assistant Attorney General Starling, John J. Powers III,* and *Laura Heiser.*

JUSTICE SCALIA delivered the opinion of the Court.

Federal Rule of Criminal Procedure 6(e)(2) prohibits public disclosure by Government attorneys of "matters occurring before the grand jury" except in certain specified circumstances. This case presents the question whether a district court order denying a criminal defendant's motion to dismiss an indictment for an alleged violation of Rule 6(e) is immediately appealable.

I

On January 23, 1987, a federal grand jury in the Western District of New York returned an indictment against petitioners Midland Asphalt Corporation, a business engaged in the sale of liquid bituminous material used to resurface roads, and Albert C. Litteer, Midland's president and part owner. The indictment alleged that they had violated § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, by conspiring with other unindicted persons to allocate contracts and to submit collusive bids to the State of New York and certain counties in western New York. On July 21, 1987, petitioners moved to dismiss the indictment on grounds which included an alleged violation by federal prosecutors of Rule 6(e)(2).

Petitioners' Rule 6(e) allegations arose from the following facts: When the grand jury that ultimately returned the Sherman Act indictment was sitting, Midland and another company under investigation brought suit seeking to have the Government pay for the cost of compliance with grand jury subpoenas. *In re Grand Jury Subpoenas to Midland Asphalt Corp. and Krantz Asphalt Co.*, Civ. No. 85–633E (WDNY, Feb. 12, 1985) *(In re Grand Jury Subpoenas).* In

that action Midland filed a motion asking that the District Court compel the Government to retain its rough and final notes of witness interviews. In response, the Government filed a memorandum in which it agreed to retain rough notes and final reports prepared by prosecutors and other Government personnel during its investigation of the western New York road-paving business. Approximately one year later, the defendants in a separate criminal case, also involving allegations of asphalt contract bid rigging in western New York State, *United States* v. *Allegany Bitumens, Inc.*, Crim. No. 86–59C (WDNY, Apr. 14, 1986), filed a similar motion to require the Government to preserve its interview notes. Again the Government filed a memorandum agreeing to do so, noting that it had already made such a commitment to the District Court, and attaching a copy of its earlier memorandum in the *In re Grand Jury Subpoenas* case.

Petitioners' motion to dismiss the indictment in the present case alleged that the Government's filing, in *Allegany Bitumens*, of its memorandum from the *In re Grand Jury Subpoenas* case, publicly "disclose[d] matters occurring before the grand jury" in violation of Rule 6(e)(2). Specifically, the motion alleged that the memorandum disclosed the nature and focus of the investigation, the name of a grand jury witness, and the fact that the witness was to testify as an individual and not as a document custodian for Midland. Finding that the prosecution had not violated Rule 6(e)(2), the District Court denied petitioners' motion to dismiss the indictment.

On appeal in the Court of Appeals for the Second Circuit, the Government moved to dismiss for lack of jurisdiction, contending that the District Court's order declining to dismiss the indictment was not a "final decision" under 28 U. S. C. § 1291. Petitioners responded that this Court's decision in *United States* v. *Mechanik*, 475 U. S. 66 (1986), in which we held that an alleged violation of Federal Rule of Criminal Procedure 6(d) was rendered harmless beyond a

reasonable doubt by a petit jury's guilty verdict, would make district court orders denying motions to dismiss indictments based on alleged violations of Rule 6(e) "effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978), and hence immediately appealable under the collateral order doctrine, see *ibid.* The Court of Appeals rejected petitioners' contention on the ground that Rule 6(d), the subsection at issue in *Mechanik*, exists primarily "to protect the person under investigation from being indicted in the absence of probable cause," 840 F. 2d 1040, 1046 (1988), whereas Rule 6(e) serves the different function of "protect[ing] society's interest in keeping secret the identity of grand jury witnesses and persons under investigation," *ibid.* It concluded that "*Mechanik* [would not] preclud[e] a federal court of appeals from exercising post-trial review of an order denying a motion to dismiss an indictment for violation of Rule 6(e)," *ibid.*, that denials of motions to dismiss indictments for alleged violations of Rule 6(e) are therefore not immediately appealable under the collateral order doctrine, and that the Government's motion to dismiss the appeal in the case before it should be granted.

We granted certiorari to resolve a disagreement among the Courts of Appeals.[1] 487 U. S. 1217 (1988).

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[1] The Court of Appeals for the Ninth Circuit has read *Mechanik* to forbid postconviction review of alleged violations of Rule 6(e), and accordingly has held that district court orders denying motions to dismiss indictments for violations of the Rule are immediately appealable under the collateral order doctrine. *United States* v. *Benjamin*, 812 F. 2d 548, 553 (1987). The Courts of Appeals for the Third, Tenth, and Eleventh Circuits have read *Mechanik* more narrowly to bar postconviction review only of "technical" violations of Rule 6, not violations calling into question the "fundamental fairness" of the criminal proceedings, and therefore have held that the latter type are not immediately appealable. *United States* v. *Johns*, 858 F. 2d 154, 159–160 (CA3 1988); *United States* v. *Taylor*, 798 F. 2d 1337, 1340 (CA10 1986); *United States* v. *Kramer*, 864 F. 2d 99, 101 (CA11 1988). The First, Seventh, and District of Columbia Circuits have held that claims which may not be reviewed following conviction pursuant to *Mechanik* are insufficiently important to fit within the small class of claims

II

In the Judiciary Act of 1789, 1 Stat. 73, the First Congress established the principle that only "final judgments and decrees" of the federal district courts may be reviewed on appeal. *Id.*, at 84. The statute has changed little since then: 28 U. S. C. § 1291 today provides that federal courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." For purposes of this provision, a final judgment is normally deemed not to have occurred "until there has been a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Van Cauwenberghe* v. *Biard*, 486 U. S. 517, 521 (1988), quoting *Catlin* v. *United States*, 324 U. S. 229, 233 (1945). In criminal cases, this prohibits appellate review until after conviction and imposition of sentence. *Flanagan* v. *United States*, 465 U. S. 259, 263 (1984); *Berman* v. *United States*, 302 U. S. 211, 212 (1937). Since petitioners have not yet even been tried, much less convicted or sentenced, it is plain that the District Court's order denying their motion to dismiss falls within this prohibition.

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), we carved out a narrow exception to the normal application of the final judgment rule, which has come to be known as the collateral order doctrine. This exception considers as "final judgments," even though they do not "end the litigation on the merits," decisions "which finally determine claims of right separate from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudi-

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eligible for interlocutory review. *United States* v. *LaRouche Campaign*, 829 F. 2d 250, 253–254 (CA1 1987); *United States* v. *Daniels*, 848 F. 2d 758, 760 (CA7 1988); *United States* v. *Poindexter*, 273 U. S. App. D. C. 240, 245–246, 859 F. 2d 216, 221–222 (1988).

cated." *Id.*, at 546. To fall within the limited class of final collateral orders, an order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, *supra*, at 468.

We have interpreted the collateral order exception "with the utmost strictness" in criminal cases. *Flanagan*, *supra*, at 265. Although we have had numerous opportunities in the 40 years since *Cohen* to consider the appealability of prejudgment orders in criminal cases, we have found denials of only three types of motions to be immediately appealable: motions to reduce bail, *Stack* v. *Boyle*, 342 U. S. 1 (1951), motions to dismiss on double jeopardy grounds, *Abney* v. *United States*, 431 U. S. 651 (1977), and motions to dismiss under the Speech or Debate Clause, *Helstoski* v. *Meanor*, 442 U. S. 500 (1979). These decisions, along with the far more numerous ones in which we have refused to permit interlocutory appeals, manifest the general rule that the third prong of the *Coopers & Lybrand* test is satisfied only where the order at issue involves "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States* v. *MacDonald*, 435 U. S. 850, 860 (1978).

We have little difficulty concluding that an order denying a motion to dismiss an indictment for an alleged violation of Rule 6(e) does not satisfy our "stringent conditions for qualification as an immediately appealable collateral order." *Flanagan*, *supra*, at 270. Whether a violation of Rule 6(e) will be reviewable on appeal following conviction, as the Court of Appeals below held, 840 F. 2d, at 1046, or will be rendered harmless as a matter of law by the conviction, as the Ninth Circuit has decided, *United States* v. *Benjamin*, 812 F. 2d 548, 553 (1987), a district court order declining to dismiss an indictment for an alleged violation of the Rule fails one or the other of the final two requirements set out in

Coopers & Lybrand. If *Mechanik* is not extended beyond violations of Rule 6(d), and if Rule 6(e) violations can accordingly provide the basis for reversal of a conviction on appeal, it is obvious that they are not "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U. S., at 468. If, on the other hand, *Mechanik* is applied to bar postconviction review of alleged violations of Rule 6(e), it will be because the purpose of that Rule is the same as the purpose of Rule 6(d), namely, to "protec[t] against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty," *Mechanik*, 475 U. S., at 70, which danger has demonstrably been avoided whenever there is a guilty verdict at trial. If this latter analysis is correct, however, orders denying motions to dismiss for Rule 6(e) violations cannot be said to "resolve an important issue completely separate from the merits of the action," *Coopers & Lybrand, supra*, at 468, but rather involve "considerations enmeshed in the merits of the dispute," *Van Cauwenberghe, supra*, at 528, and would "affect . . . *or be affected by*" the decision on the merits of the case, *DiBella* v. *United States*, 369 U. S. 121, 126 (1962) (emphasis added). Thus, whatever view one takes of the scope of *Mechanik* (an issue we need not resolve here), the present order is not immediately appealable.

Petitioners attempt to avoid this reasoning by suggesting that orders of this sort, even if theoretically reviewable after conviction, are "effectively unreviewable," *Coopers & Lybrand, supra*, at 468, once trial has been held, because they pertain to a right "the . . . practical value of which [is] destroyed if it [is] not vindicated before trial," *MacDonald, supra*, at 860—namely, the right not merely not to be convicted, but *not to be tried at all* "on an indictment returned by a grand jury whose decision to indict was substantially influenced by the government's violation of 6(e)." Brief for Petitioner 24. We do not agree. It is true that deprivation of the right not to be tried satisfies the *Coopers & Lybrand*

requirement of being "effectively unreviewable on appeal from a final judgment." See *Abney* v. *United States*, *supra*; *Helstoski* v. *Meanor*, *supra*. One must be careful, however, not to play word games with the concept of a "right not to be tried." In one sense, any legal rule can be said to give rise to a "right not to be tried" if failure to observe it requires the trial court to dismiss the indictment or terminate the trial. But that is assuredly not the sense relevant for purposes of the exception to the final judgment rule.

> "Certainly, the fact that this Court has held dismissal of the indictment to be the proper remedy when the Sixth Amendment right to a speedy trial has been violated . . . does not mean that a defendant enjoys a 'right not to be tried' which must be safeguarded by interlocutory appellate review. Dismissal of the indictment is the proper sanction when a defendant has been granted immunity from prosecution, when his indictment is defective, or, usually, when the only evidence against him was seized in violation of the Fourth Amendment. Obviously, however, this has not led the Court to conclude that such defendants can pursue interlocutory appeals." *MacDonald*, *supra*, at 860, n. 7.

There is a "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges." *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 269 (1982). A right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause ("nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb"), see *Abney* v. *United States*, *supra*, or the Speech or Debate Clause ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place"), see *Helstoski* v. *Meanor*, *supra*. Neither Rule 6(e) nor the Constitution affords such a guarantee in the event of a violation of grand jury secrecy.

The text of Rule 6(e) contains no hint that a governmental violation of its prescriptions gives rise to a right not to stand trial. To be sure, we held last Term in *Bank of Nova Scotia* v. *United States*, 487 U. S. 250, 263 (1988), that a district court has authority in certain circumstances to dismiss an indictment for violations of Rule 6(e). But as just noted, that has nothing to do with a "right not to be tried" in the sense relevant here.

As for the Grand Jury Clause of the Fifth Amendment, that reads in relevant part as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." That does indeed confer a right not to be tried (in the pertinent sense) when there is no grand jury indictment. Undoubtedly the common-law protections traditionally associated with the grand jury attach to the grand jury required by this provision—including the requisite secrecy of grand jury proceedings. But that is far from saying that every violation of those protections, like the lack of a grand jury indictment itself, gives rise to a right not to be tried. We have held that even the grand jury's violation of the defendant's right against self-incrimination does not trigger the Grand Jury Clause's "right not to be tried." *Lawn* v. *United States*, 355 U. S. 339, 349 (1958). Only a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried. An isolated breach of the traditional secrecy requirements does not do so.

* * *

For these reasons, the Court of Appeals was correct to grant the Government's motion to dismiss the appeal, and its judgment is

Affirmed.

DAVIS *v.* MICHIGAN DEPARTMENT OF THE TREASURY

APPEAL FROM THE COURT OF APPEALS OF MICHIGAN

No. 87–1020. Argued January 9, 1989—Decided March 28, 1989

In each of the years 1979 through 1984, appellant, a Michigan resident and former federal employee, paid state income tax on his federal retirement benefits in accordance with the Michigan Income Tax Act, which exempts from taxation all retirement benefits paid by the State or its political subdivisions, but taxes retirement benefits paid by other employers, including the Federal Government. After the State denied appellant's request for refunds, he filed suit in the Michigan Court of Claims, alleging that the State's inconsistent treatment of retirement benefits violated 4 U. S. C. § 111, which authorizes States to tax "pay or compensation for personal services as [a federal] officer or employee . . . , if the taxation does not discriminate against the . . . employee because of the source of the pay or compensation." The Court of Claims denied relief, and the Michigan Court of Appeals affirmed, ruling that appellant is an "annuitant" under federal law rather than an "employee" within the meaning of § 111, and that that section therefore has no application to him. The Court of Appeals also held that the doctrine of intergovernmental tax immunity did not render the State's discriminatory tax scheme unconstitutional, since the discrimination was justified under a rational-basis test: The State's interest in attracting and retaining qualified employees was a legitimate objective which was rationally achieved by a retirement plan offering economic inducements.

Held:

1. Section 111 applies to federal retirees such as appellant. The State's contention that the section is limited to current federal employees is refuted by the plain language of the statute's first clause. Since the amount of civil service retirement benefits is based and computed upon an individual's salary and years of service, it represents deferred compensation for service to the Government, and therefore constitutes "pay or compensation . . . as [a federal] employee" within the meaning of that clause. The State's contention that, since this quoted language does not occur in the statute's second, nondiscrimination clause, that clause applies only to current employees, is hypertechnical and fails to read the nondiscrimination clause in its context within the overall statutory scheme. The reference to "*the* pay or compensation" in the latter clause must, in context, mean the same "pay or compensation" defined in

the section's first clause and thus includes retirement benefits. The State's reading of the clause is implausible because it is unlikely that Congress consented to discriminatory taxation of retired federal civil servants' pensions while refusing to permit such taxation of current employees, and there is nothing in the statutory language or legislative history to suggest such a result. Pp. 808–810.

2. Section 111's language, purpose, and legislative history establish that the scope of its nondiscrimination clause's grant or retention of limited tax immunity for federal employees is coextensive with, and must be determined by reference to, the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity. Pp. 810–814.

3. Michigan's tax scheme violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees. Pp. 814–817.

(a) The State's contention that appellant is not entitled to claim the protection of the immunity doctrine is without merit. Although the doctrine is based on the need to protect each sovereign's governmental operations from undue interference by another sovereign, this Court's precedents establish that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign can themselves receive the protection of the constitutional doctrine. See, for example, *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S. 376, 387. Pp. 814–815.

(b) In determining whether the State's inconsistent tax treatment of federal and state retirees is permissible, the relevant inquiry is whether the inconsistency is directly related to and justified by "significant differences between the two classes." *Phillips*, *supra*, at 384–385. The State's claimed interest in hiring qualified civil servants through the inducement of a tax exemption for retirement benefits is irrelevant to this inquiry, since it merely demonstrates that the State has a rational reason for discriminating between two similar groups of retirees without demonstrating any differences between those groups themselves. Moreover, the State's claim that its retirement benefits are significantly less munificent than federal benefits in terms of vesting requirements, rate of accrual, and benefit computations is insufficient to justify the type of blanket exemption at issue here. A tax exemption truly intended to account for differences in benefits would not discriminate on the basis of the source of those benefits, but would, rather, discriminate on the basis of the amount of benefits received by individual retirees. Pp. 815–817.

4. Because the State concedes that a refund is appropriate in these circumstances, appellant is entitled to a refund to the extent he has paid

taxes pursuant to the invalid Michigan scheme. However, his additional claim for prospective relief from discriminatory taxation should be decided by the state courts, whose special expertise in state law puts them in a better position than this Court to fashion the remedy most appropriate to comply with the constitutional mandate of equal treatment. Pp. 817–818.

106 Mich. App. 98, 408 N. W. 2d 433, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 818.

Paul S. Davis, pro se, argued the cause and filed briefs for appellant.

Michael K. Kellogg argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Fried, Assistant Attorney General Rose, Deputy Solicitor General Merrill, David English Carmack*, and *Steven W. Parks*.

Thomas L. Casey, Assistant Solicitor General of Michigan, argued the cause for appellee. With him on the brief were *Frank J. Kelley*, Attorney General, *Louis J. Caruso*, Solicitor General, and *Richard R. Roesch* and *Ross H. Bishop*, Assistant Attorneys General.*

JUSTICE KENNEDY delivered the opinion of the Court.

The State of Michigan exempts from taxation all retirement benefits paid by the State or its political subdivisions, but levies an income tax on retirement benefits paid by all other employers, including the Federal Government. The question presented by this case is whether Michigan's tax scheme violates federal law.

I

Appellant Paul S. Davis, a Michigan resident, is a former employee of the United States Government. He receives re-

**Joseph B. Scott* and *Michael J. Kator* filed a brief for the National Association of Retired Federal Employees as *amicus curiae* urging reversal.

tirement benefits pursuant to the Civil Service Retirement Act, 5 U. S. C. § 8331 *et seq.* In each of the years 1979 through 1984, appellant paid Michigan state income tax on his federal retirement benefits in accordance with Mich. Comp. Laws Ann. § 206.30(1)(f) (Supp. 1988).[1] That statute defines taxable income in a manner that excludes all retirement benefits received from the State or its political subdivisions, but includes most other forms of retirement benefits.[2] The effect of this definition is that the retirement benefits of retired state employees are exempt from state taxation while the benefits received by retired federal employees are not.

In 1984, appellant petitioned for refunds of state taxes paid on his federal retirement benefits between 1979 and 1983. After his request was denied, appellant filed suit in the Michigan Court of Claims. Appellant's complaint, which was amended to include the 1984 tax year, averred that his federal retirement benefits were "not legally taxable under

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[1] As a result of a series of amendments, this subsection has been variously designated as (1)(f), (1)(g), and (1)(h) at times relevant to this litigation. This opinion will refer only to the current statutory designation, § 206.30(1)(f).

[2] In pertinent part, the statute provides:

"(1) 'Taxable income' . . . means adjusted gross income as defined in the internal revenue code subject to the following adjustments:

. . . . . .

"(f) Deduct to the extent included in adjusted gross income:

"(i) Retirement or pension benefits received from a public retirement system of or created by an act of this state or a political subdivision of this state.

. . . . . .

"(iv) Retirement or pension benefits from any other retirement or pension system as follows:

"(A) For a single return, the sum of not more than $7,500.00.

"(B) For a joint return, the sum of not more than $10,000.00." Mich. Comp. Laws Ann. § 206.30(1)(f) (Supp. 1988).

Subsection (f)(iv) of this provision exempts a portion of otherwise taxable retirement benefits from taxable income, but appellant's retirement pay from all nonstate sources exceeded the applicable exemption amount in each of the tax years relevant to this case.

the Michigan Income Tax Law" and that the State's inconsistent treatment of state and federal retirement benefits discriminated against federal retirees in violation of 4 U. S. C. § 111, which preserves federal employees' immunity from discriminatory state taxation. See Public Salary Tax Act of 1939, ch. 59, § 4, 53 Stat. 575, codified, as amended, at 4 U. S. C. § 111. The Court of Claims, however, denied relief. No. 84–9451 (Oct. 30, 1985), App. to Juris. Statement A10.

The Michigan Court of Appeals affirmed. 160 Mich. App. 98, 408 N. W. 2d 433 (1987). The court first rejected appellant's claim that 4 U. S. C. § 111 invalidated the State's tax on appellant's federal benefits. Noting that § 111 applies only to federal "employees," the court determined that appellant's status under federal law was that of an "annuitant" rather than an employee. As a consequence, the court concluded that § 111 "has no application to [Davis], since [he] cannot be considered an employee within the meaning of that act." *Id.*, at 104, 408 N. W. 2d, at 435.

The Michigan Court of Appeals next rejected appellant's contention that the doctrine of intergovernmental tax immunity rendered the State's tax treatment of federal retirement benefits unconstitutional. Conceding that "a tax may be held invalid . . . if it operates to discriminate against the federal government and those with whom it deals," *id.*, at 104, 408 N. W. 2d, at 436, the court examined the State's justifications for the discrimination under a rational-basis test. *Ibid.* The court determined that the State's interest in "attracting and retaining . . . qualified employees" was a "legitimate state objective which is rationally achieved by a retirement plan offering economic inducements," and it upheld the statute. *Id.*, at 105, 408 N. W. 2d, at 436.

The Supreme Court of Michigan denied appellant's application for leave to appeal. 429 Mich. 854 (1987). We noted probable jurisdiction. 487 U. S. 1217 (1988).

II

Appellant places principal reliance on 4 U. S. C. § 111. In relevant part, that section provides:

> "The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation."

As a threshold matter, the State argues that § 111 applies only to current employees of the Federal Government, not to retirees such as appellant. In our view, however, the plain language of the statute dictates the opposite conclusion. Section 111 by its terms applies to "the taxation of pay or *compensation for personal services as an officer or employee* of the United States." (Emphasis added). While retirement pay is not actually disbursed during the time an individual is working for the Government, the amount of benefits to be received in retirement is based and computed upon the individual's salary and years of service. 5 U. S. C. § 8339(a). We have no difficulty concluding that civil service retirement benefits are deferred compensation for past years of service rendered to the Government. See, *e. g.*, *Zucker* v. *United States*, 758 F. 2d 637, 639 (CA Fed.), cert. denied, 474 U. S. 842 (1985); *Kizas* v. *Webster*, 227 U. S. App. D. C. 327, 339, 707 F. 2d 524, 536, (1983), cert. denied, 464 U. S. 1042 (1984); *Clark* v. *United States*, 691 F. 2d 837, 842 (CA7 1982). And because these benefits accrue to employees on account of their service to the Government, they fall squarely within the category of compensation for services rendered "as an officer or employee of the United States." Appellant's federal retirement benefits are deferred compensation earned "as" a federal employee, and so are subject to § 111.[3]

[3] The State suggests that the legislative history does not support this interpretation of § 111, pointing to statements in the Committee Reports

The State points out, however, that the reference to "compensation for personal services *as* an officer or employee" occurs in the first part of § 111, which defines the extent of Congress' consent to state taxation, and not in the latter part of the section, which provides that the consent does not extend to taxes that discriminate against federal employees. Instead, the nondiscrimination clause speaks only in terms of "discriminat[ion] against the officer or employee because of the source of the pay or compensation." From this the State concludes that, whatever the scope of Congress' consent to taxation in the first portion of § 111, the nondiscrimination clause applies only to current federal employees.

Although the State's hypertechnical reading of the nondiscrimination clause is not inconsistent with the language of that provision examined in isolation, statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. See *United States* v. *Morton*, 467 U. S. 822, 828 (1984). When the first part of § 111 is read together with the nondiscrimination clause, the operative words of the statute are as follows: "The United States consents to the taxation of pay or compensation . . . if the taxation does not discriminate . . . because of the source of the pay or compensation." The reference to "*the* pay or compensation" in the last clause of § 111 must, in context, mean the same "pay or compensation" defined in the first part of the section. Since that "pay or compensation" includes retirement benefits, the nondiscrimination clause must include them as well.

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that describe the scope of § 111 without using the phrase "service as an officer or employee." The language of the statute leaves no room for doubt on this point, however, so the State's attempt to establish a minor inconsistency with the legislative history need not detain us. Legislative history is irrelevant to the interpretation of an unambiguous statute. *United Air Lines, Inc.* v. *McMann*, 434 U. S. 192, 199 (1977).

Any other interpretation of the nondiscrimination clause would be implausible at best. It is difficult to imagine that Congress consented to discriminatory taxation of the pensions of retired federal civil servants while refusing to permit such taxation of current employees, and nothing in the statutory language or even in the legislative history suggests this result. While Congress could perhaps have used more precise language, the overall meaning of § 111 is unmistakable: it waives whatever immunity past and present federal employees would otherwise enjoy from state taxation of salaries, retirement benefits, and other forms of compensation paid on account of their employment with the Federal Government, except to the extent that such taxation discriminates on account of the source of the compensation.

III

Section 111 was enacted as part of the Public Salary Tax Act of 1939, the primary purpose of which was to impose federal income tax on the salaries of all state and local government employees. Prior to adoption of the Act, salaries of most government employees, both state and federal, generally were thought to be exempt from taxation by another sovereign under the doctrine of intergovernmental tax immunity. This doctrine had its genesis in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), which held that the State of Maryland could not impose a discriminatory tax on the Bank of the United States. Chief Justice Marshall's opinion for the Court reasoned that the Bank was an instrumentality of the Federal Government used to carry into effect the Government's delegated powers, and taxation by the State would unconstitutionally interfere with the exercise of those powers. *Id.*, at 425–437.

For a time, *McCulloch* was read broadly to bar most taxation by one sovereign of the employees of another. See *Collector* v. *Day*, 11 Wall. 113, 124–128 (1871) (invalidating federal income tax on salary of state judge); *Dobbins* v. *Com-*

missioners of Erie County, 16 Pet. 435 (1842) (invalidating state tax on federal officer). This rule "was based on the rationale that any tax on income a party received under a contract with the government was a tax on the contract and thus a tax 'on' the government because it burdened the government's power to enter into the contract." *South Carolina* v. *Baker*, 485 U. S. 505, 518 (1988).

In subsequent cases, however, the Court began to turn away from its more expansive applications of the immunity doctrine. Thus, in *Helvering* v. *Gerhardt*, 304 U. S. 405 (1938), the Court held that the Federal Government could levy nondiscriminatory taxes on the incomes of most state employees. The following year, *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 486–487 (1939), overruled the *Day-Dobbins* line of cases that had exempted government employees from nondiscriminatory taxation. After *Graves*, therefore, intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt.

It was in the midst of this judicial revision of the immunity doctrine that Congress decided to extend the federal income tax to state and local government employees. The Public Salary Tax Act was enacted after *Helvering* v. *Gerhardt*, *supra*, had upheld the imposition of federal income taxes on state civil servants, and Congress relied on that decision as support for its broad assertion of federal taxing authority. S. Rep. No. 112, 76th Cong., 1st Sess., 5–9 (1939); H. R. Rep. No. 26, 76th Cong., 1st Sess., 2–3 (1939). However, the Act was drafted, considered in Committee, and passed by the House of Representatives before the announcement of the decision in *Graves* v. *New York ex rel. O'Keefe*, *supra*, which for the first time permitted state taxation of federal employees. As a result, during most of the legislative process leading to adoption of the Act it was unclear whether state taxation of federal employees was still barred by inter-

governmental tax immunity despite the abrogation of state employees' immunity from federal taxation. See H. R. Rep. No. 26, *supra*, at 2 ("There are certain indications in the case of *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), . . . that . . . Federal officers and employees may not, without the consent of the United States, be subjected to income taxation under the authority of the various States").

Dissatisfied with this uncertain state of affairs, and concerned that considerations of fairness demanded equal tax treatment for state and federal employees, Congress decided to ensure that federal employees would not remain immune from state taxation at the same time that state government employees were being required to pay federal income taxes. See S. Rep. No. 112, *supra*, at 4; H. R. Rep. No. 26, *supra*, at 2. Accordingly, § 4 of the proposed Act (now § 111) expressly waived whatever immunity would have otherwise shielded federal employees from nondiscriminatory state taxes.

By the time the statute was enacted, of course, the decision in *Graves* had been announced, so the constitutional immunity doctrine no longer proscribed nondiscriminatory state taxation of federal employees. In effect, § 111 simply codified the result in *Graves* and foreclosed the possibility that subsequent judicial reconsideration of that case might reestablish the broader interpretation of the immunity doctrine.

Section 111 did not waive all aspects of intergovernmental tax immunity, however. The final clause of the section contains an exception for state taxes that discriminate against federal employees on the basis of the source of their compensation. This nondiscrimination clause closely parallels the nondiscrimination component of the constitutional immunity doctrine which has, from the time of *McCulloch* v. *Maryland*, barred taxes that "operat[e] so as to discriminate against the Government or those with whom it deals." *United States* v. *City of Detroit*, 355 U. S. 466, 473 (1958). See also *McCulloch* v. *Maryland*, *supra*, at 436–437; *Miller*

v. *Milwaukee*, 272 U. S. 713, 714–715 (1927); *Helvering* v. *Gerhardt*, *supra*, at 413; *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S. 376, 385 (1960); *Memphis Bank & Trust Co.* v. *Garner*, 459 U. S. 392, 397, and n. 7 (1983).

In view of the similarity of language and purpose between the constitutional principle of nondiscrimination and the statutory nondiscrimination clause, and given that § 111 was consciously drafted against the background of the Court's tax immunity cases, it is reasonable to conclude that Congress drew upon the constitutional doctrine in defining the scope of the immunity retained in § 111. When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts. See *Midlantic National Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 501 (1986); *Morissette* v. *United States*, 342 U. S. 246, 263 (1952). Hence, we conclude that the retention of immunity in § 111 is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity. Cf. *Memphis Bank & Trust*, *supra*, at 396–397 (construing 31 U. S. C. § 742, which permits only "'nondiscriminatory'" state taxation of interest on federal obligations, as "principally a restatement of the constitutional rule").

On its face, § 111 purports to be nothing more than a partial congressional consent to nondiscriminatory state taxation of federal employees. It can be argued, however, that by negative implication § 111 also constitutes an affirmative statutory grant of immunity from discriminatory state taxation in addition to, and coextensive with, the pre-existing protection afforded by the constitutional doctrine. Regardless of whether § 111 provides an independent basis for finding immunity or merely preserves the traditional constitutional prohibition against discriminatory taxes, however, the in-

quiry is the same. In either case, the scope of the immunity granted or retained by the nondiscrimination clause is to be determined by reference to the constitutional doctrine. Thus, the dispositive question in this case is whether the tax imposed on appellant is barred by the doctrine of intergovernmental tax immunity.

IV

It is undisputed that Michigan's tax system discriminates in favor of retired state employees and against retired federal employees. The State argues, however, that appellant is not entitled to claim the protection of the immunity doctrine, and that in any event the State's inconsistent treatment of Federal and State Government retirees is justified by meaningful differences between the two classes.

A

In support of its first contention, the State points out that the purpose of the immunity doctrine is to protect governments and not private entities or individuals. As a result, so long as the challenged tax does not interfere with the Federal Government's ability to perform its governmental functions, the constitutional doctrine has not been violated.

It is true that intergovernmental tax immunity is based on the need to protect each sovereign's governmental operations from undue interference by the other. *Graves*, 306 U. S., at 481; *McCulloch* v. *Maryland*, 4 Wheat., at 435–436. But it does not follow that private entities or individuals who are subjected to discriminatory taxation on account of their dealings with a sovereign cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary. In *Phillips Chemical Co., supra*, for example, we considered a private corporation's claim that a state tax discriminated against private lessees of federal land. We concluded that the tax "discriminate[d] unconstitutionally against the United States *and its lessee*," and accordingly held that the tax could not be exacted. *Id.*, at 387

(emphasis added). See also *Memphis Bank & Trust, supra; Moses Lake Homes, Inc.* v. *Grant County*, 365 U. S. 744 (1961); *Collector* v. *Day*, 11 Wall. 113 (1871); *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435 (1842). The State offers no reasons for departing from this settled rule, and we decline to do so.[4]

B

Under our precedents, "[t]he imposition of a heavier tax burden on [those who deal with one sovereign] than is im-

[4] The dissent argues that this tax is nondiscriminatory, and thus constitutional, because it "draws no distinction between the federal employees or retirees and the vast majority of voters in the State." *Post*, at 823. In *Phillips Chemical Co.*, however, we faced that precise situation: an equal tax burden was imposed on lessees of private, tax-exempt property and lessees of federal property, while lessees of state property paid a lesser tax, or in some circumstances none at all. Although we concluded that "[u]nder these circumstances, there appears to be no discrimination between the Government's lessees and lessees of private property," 361 U. S., at 381, we nonetheless invalidated the State's tax. This result is consistent with the underlying rationale for the doctrine of intergovernmental tax immunity. The danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it. As we observed in *Phillips Chemical Co.*, "it does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself." *Id.*, at 385.

We also take issue with the dissent's assertion that "it is peculiarly inappropriate to focus solely on the treatment of state governmental employees" because "[t]he State may always compensate in pay or salary for what it assesses in taxes." *Post*, at 824. In order to provide the same after-tax benefits to all retired state employees by means of increased salaries or benefit payments instead of a tax exemption, the State would have to increase its outlays by more than the cost of the current tax exemption, since the increased payments to retirees would result in higher federal income tax payments in some circumstances. This fact serves to illustrate the impact on the Federal Government of the State's discriminatory tax exemption for state retirees. Taxes enacted to reduce the State's employment costs at the expense of the federal treasury are the type of discriminatory legislation that the doctrine of intergovernmental tax immunity is intended to bar.

posed on [those who deal with the other] must be justified by significant differences between the two classes." *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S., at 383. In determining whether this standard of justification has been met, it is inappropriate to rely solely on the mode of analysis developed in our equal protection cases. We have previously observed that "our decisions in [the equal protection] field are not necessarily controlling where problems of intergovernmental tax immunity are involved," because "the Government's interests must be weighed in the balance." *Id.*, at 385. Instead, the relevant inquiry is whether the inconsistent tax treatment is directly related to, and justified by, "significant differences between the two classes." *Id.*, at 383–385.

The State points to two allegedly significant differences between federal and state retirees. First, the State suggests that its interest in hiring and retaining qualified civil servants through the inducement of a tax exemption for retirement benefits is sufficient to justify the preferential treatment of its retired employees. This argument is wholly beside the point, however, for it does nothing to demonstrate that there are "significant differences between the two classes" themselves; rather, it merely demonstrates that the State has a rational reason for discriminating between two similar groups of retirees. The State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment. See *id.*, at 384.

Second, the State argues that its retirement benefits are significantly less munificent than those offered by the Federal Government, in terms of vesting requirements, rate of accrual, and computation of benefit amounts. The substantial differences in the value of the retirement benefits paid the two classes should, in the State's view, justify the inconsistent tax treatment.

Even assuming the State's estimate of the relative value of state and federal retirement benefits is generally correct, we do not believe this difference suffices to justify the type of blanket exemption at issue in this case. While the average retired federal civil servant receives a larger pension than his state counterpart, there are undoubtedly many individual instances in which the opposite holds true. A tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees. Cf. *Phillips Chemical Co., supra*, at 384–385 (rejecting proffered rationale for State's unfavorable tax treatment of lessees of federal property, because an evenhanded application of the rationale would have resulted in inclusion of some lessees of state property in the disfavored class as well).

V

For these reasons, we conclude that the Michigan Income Tax Act violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees. The State having conceded that a refund is appropriate in these circumstances, see Brief for Appellee 63, to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund. See *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 247 (1931).

Appellant also seeks prospective relief from discriminatory taxation. With respect to this claim, however, we are not in the best position to ascertain the appropriate remedy. While invalidation of Michigan's income tax law in its entirety obviously would eliminate the constitutional violation, the Constitution does not require such a drastic solution. We have recognized, in cases involving invalid classifications in the distribution of government benefits, that the appropriate remedy "is a *mandate* of equal treatment, a result that can be

accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler* v. *Mathews*, 465 U. S. 728, 740 (1984). See *Iowa-Des Moines National Bank*, *supra*, at 247; see also *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in judgment).

In this case, appellant's claim could be resolved either by extending the tax exemption to retired federal employees (or to all retired employees), or by eliminating the exemption for retired state and local government employees. The latter approach, of course, could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court. See *Moses Lake Homes, Inc.* v. *Grant County*, 365 U. S., at 752 ("Federal courts may not assess or levy taxes"). The permissibility of either approach, moreover, depends in part on the severability of a portion of § 206.30(1)(f) from the remainder of the Michigan Income Tax Act, a question of state law within the special expertise of the Michigan courts. See *Louis K. Liggett Co.* v. *Lee*, 288 U. S. 517, 540–541 (1933). It follows that the Michigan courts are in the best position to determine how to comply with the mandate of equal treatment. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, dissenting.

The States can tax federal employees or private parties who do business with the United States so long as the tax does not discriminate against the United States. *South Carolina* v. *Baker*, 485 U. S. 505, 523 (1988); *United States* v. *County of Fresno*, 429 U. S. 452, 462 (1977). The Court today strikes down a state tax that applies equally to the vast majority of Michigan residents, including federal employees, because it treats retired state employees differently from retired federal employees. The Court's holding is not supported by the rationale for the intergovernmental immu-

nity doctrine and is not compelled by our previous decisions. I cannot join the unjustified, court-imposed restriction on a State's power to administer its own affairs.

The constitutional doctrine of intergovernmental immunity, Justice Frankfurter explained, "finds its explanation and justification . . . in avoiding the potentialities of friction and furthering the smooth operation of complicated governmental machinery." *City of Detroit* v. *Murray Corp.*, 355 U. S. 489, 504 (1958). To protect the smooth operation of dual governments in a federal system, it was at one time thought necessary to prohibit state taxation of the salaries of officers and employees of the United States, *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435 (1842), as well as federal taxation of the salaries of state officials. *Collector* v. *Day*, 11 Wall. 113 (1871). The Court has since forsworn such "wooden formalism." *Washington* v. *United States*, 460 U. S. 536, 544 (1983).

The nondiscrimination rule recognizes the fact that the Federal Government has no voice in the policy decisions made by the several States. The Federal Government's protection against state taxation that singles out federal agencies for special burdens is therefore provided by the Supremacy Clause of the Federal Constitution, the doctrine of intergovernmental tax immunity, and statutes such as 4 U. S. C. § 111.[1] When the tax burden is shared equally by federal agents and the vast majority of a State's citizens, however, the nondiscrimination principle is not applicable and constitutional protection is not necessary. As the Court explained in *United States* v. *County of Fresno:*

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[1] The legislative history of 4 U. S. C. § 111 correctly describes the purpose of the nondiscrimination principle as "[t]o protect the Federal Government against the unlikely possibility of State and local taxation of compensation of Federal officers and employees which is aimed at, or threatens the efficient operation of, the Federal Government." H. R. Rep. No. 26, 76th Cong., 1st Sess., 5 (1939); S. Rep. No. 112, 76th Cong., 1st Sess., 12 (1939).

"The rule to be derived from the Court's more recent decisions, then, is that the economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State. This rule returns to the original intent of *M'Culloch* v. *Maryland*. The political check against abuse of the taxing power found lacking in *M'Culloch*, where the tax was imposed solely on the Bank of the United States, is present where the State imposes a nondiscriminatory tax only on its constituents or their artificially owned entities; and *M'Culloch* foresaw the unfairness in forcing a State to exempt private individuals with beneficial interests in federal property from taxes imposed on similar interests held by others in private property. Accordingly, *M'Culloch* expressly excluded from its rule a tax on 'the interest which the citizens of Maryland may hold [in a federal instrumentality] in common with other property of the same description throughout the State.' 4 Wheat., at 436." 429 U. S., at 462–464.[2]

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[2]The quotation in the text omits one footnote, but this footnote is relevant:

"[11]A tax on the income of federal employees, or a tax on the possessory interest of federal employees in Government houses, if imposed only on them, could be escalated by a State so as to destroy the federal function performed by them either by making the Federal Government unable to hire anyone or by causing the Federal Government to pay prohibitively high salaries. This danger would never arise, however, if the tax is also imposed on the income and property interests of all other residents and voters of the State." 429 U. S., at 463.

The Court has repeatedly emphasized that the rationale of the nondiscrimination rule is met when there is a political check against excessive taxation. See *South Carolina* v. *Baker*, 485 U. S. 505, 526, n. 15 (1988) ("[T]he best safeguard against excessive taxation (and the most judicially manageable) is the requirement that the government tax in a nondiscriminatory fashion. For where a government imposes a nondiscriminatory tax, judges can term the tax 'excessive' only by second-guessing the extent to which the taxing

If Michigan were to tax the income of federal employees without imposing a like tax on others, the tax would be plainly unconstitutional. Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 425–437 (1819). On the other hand, if the State taxes the income of all its residents equally, federal employees must pay the tax. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939). See *United States* v. *County of Fresno*, 429 U. S., at 468 (STEVENS, J., dissenting). The Michigan tax here applies to approximately 4½ million individual taxpayers in the State, including the 24,000 retired federal employees. It exempts only the 130,000 retired state employees. Tr. of Oral Arg. 35–36. Once one understands the underlying reason for the *McCulloch* holding, it is plain that this tax does not unconstitutionally discriminate against federal employees.

The Court reaches the opposite result only by examining whether the tax treatment of federal employees is equal to that of one discrete group of Michigan residents—retired state employees. It states: "It is undisputed that Michigan's tax system discriminates in favor of retired state employees and against retired federal employees." *Ante*, at 814. But it does not necessarily follow that such a tax "discriminate[s] against the [federal] officer or employee because of the source of the pay or compensation." 4 U. S. C. § 111. The fact that a State may elect to grant a preference, or an exemption, to a small percentage of its residents does not make the tax discriminatory in any sense that is relevant to the doctrine of intergovernmental tax immunity. The obligation of a federal judge to pay the same tax that is imposed on the

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government and its people have taxed themselves, and the threat of destroying another government can be realized only if the taxing government is willing to impose taxes that will also destroy itself or its constituents"); *Washington* v. *United States*, 460 U. S. 536, 545 (1983) ("A 'political check' is provided when a state tax falls on a significant group of state citizens who can be counted upon to use their votes to keep the State from raising the tax excessively, and thus placing an unfair burden on the Federal Government. It has been thought necessary because the United States does not have a direct voice in the state legislatures").

income of similarly situated citizens in the State should not be affected by the fact that the State might choose to grant an exemption to a few of its taxpayers—whether they be state judges, other state employees, or perhaps a select group of private citizens. Such an exemption might be granted "in spite of" and not necessarily "because of" its adverse effect on federal employees. Cf. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279 (1979). Indeed, at least 14 other States grant special tax exemptions for retirement income to state and local government employees that they do not grant to federal employees.[3] As long as a state

[3] See Ariz. Rev. Stat. Ann. §§ 43–1022(3) and (4) (Supp. 1988) (benefits, annuities, and pensions received from the state retirement system, the state retirement plan, the judges' retirement fund, the public safety personnel retirement system, or a county or city retirement plan exempt in their entirety; income received from the United States civil service retirement system exempt only up to $2500); Colo. Rev. Stat. §§ 39–22–104(4)(f) and (g) (Supp. 1988) (amounts received as pensions or annuities from any source exempt up to $20,000, but amounts received from Federal Government as retirement pay by retired member of Armed Forces less than 55 years of age exempt only up to $2000); Ga. Code Ann. § 48–7–27(a)(4)(A) (Supp. 1988) (income from employees' retirement system exempt); La. Rev. Stat. Ann. §§ 42:545, 47:44.1 (West Supp. 1989) (annuities, retirement allowances and benefits paid under the state employee retirement system exempt from state or municipal taxation in their entirety, but other annuities exempt only up to $6000); Md. Tax-Gen. Code Ann. § 10–207(o) (1988) (fire, rescue, or ambulance personnel length of service award funded by any county or municipal corporation of State exempt); Mo. Rev. Stat. § 169.587 (Supp. 1989) (retirement allowance, benefit, funds, property, or rights under public school retirement system exempt); Mont. Code Ann. §§ 15–30–111(2)(c)–(f) (1987) (benefits under teachers retirement law, public employees retirement system, and highway patrol law exempt in their entirety; benefits under Federal Employees Retirement Act exempt only up to $3600); N. Y. Tax Law § 612(c)(3) (McKinney 1987) (pensions to officers and employees of State, its subdivisions and agencies exempt); N. C. Gen. Stat. §§ 105–141(b)(13) and (14) (Supp. 1988) (amounts received from retirement and pension funds established for firemen and law enforcement officers exempt in their entirety, but amounts received from federal-employee-retirement program exempt only up to $4000); Ore. Rev. Stat. §§ 316.680(1)(c) and (d) (1987) (payments from Public Employes Retire-

income tax draws no distinction between the federal employees or retirees and the vast majority of voters in the State, I see no reason for concern about the kind of "discrimination" that these provisions make. The intergovernmental immunity doctrine simply does not constitute a most favored nation provision requiring the States to accord federal employees and federal contractors the greatest tax benefits that they give any other group subject to their jurisdiction.

To be sure, there is discrimination against federal employees—and all other Michigan taxpayers—if a small group of residents is granted an exemption. If the size of the exempt group remains the same—say, no more than 10% of the populace—the burden on federal interests also remains the same, regardless of how the exempt class is defined. Whether it includes schoolteachers, church employees, state judges, or perhaps handicapped persons, is a matter of indifference to the Federal Government as long as it can fairly be said that

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ment Fund exempt in their entirety, but payments under public retirement system established by United States exempt only up to $5000); S. C. Code §§ 12–7–435(a), (d), (e) (Supp. 1988) (amounts received from state retirement systems and retirement pay received by police officers and firemen from municipal or county retirement plans exempt in their entirety; federal civil service retirement annuity exempt only up to $3000); Va. Code § 58.1–322(C)(3) (Supp. 1988) (pensions or retirement income to officers or employees of Commonwealth, its subdivisions and agencies, or surviving spouses of such officers or employees paid by the Commonwealth or an agency or subdivision thereof exempt); W. Va. Code §§ 11–21–12(c)(5) and (6) (Supp. 1988) (annuities, retirement allowances, returns of contributions or any other benefit received under the public employees retirement system, the department of public safety death, disability, and retirement fund, the state teachers' retirement system, pensions and annuities under any police or firemen's retirement system exempt); Wis. Stat. § 71.05(1)(a) (Supp. 1988–1989) (payments received from the employees' retirement system of city of Milwaukee, Milwaukee city employees' retirement system, sheriff's retirement and benefit fund of Milwaukee, firefighters' annuity and benefit fund of Milwaukee, the public employee trust fund, and the state teachers' retirement system exempt).

federal employees are treated like other ordinary residents of the State.

Even if it were appropriate to determine the discriminatory nature of a tax system by comparing the treatment of federal employees with the treatment of another discrete group of persons, it is peculiarly inappropriate to focus solely on the treatment of state governmental employees. The State may always compensate in pay or salary for what it assesses in taxes. Thus a special tax imposed only on federal and state employees nonetheless may reflect the type of disparate treatment that the intergovernmental tax immunity forbids because of the ability of the State to adjust the compensation of its employees to avoid any special tax burden on them. *United States* v. *County of Fresno*, 429 U. S., at 468–469 (STEVENS, J., dissenting). It trivializes the Supremacy Clause to interpret it as prohibiting the States from providing through this limited tax exemption what the State has an unquestionable right to provide through increased retirement benefits.[4]

Arguably, the Court's holding today is merely a logical extension of our decisions in *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S. 376 (1960), and *Memphis Bank & Trust Co.* v. *Garner*, 459 U. S. 392 (1983). Even if it were, I would disagree with it. Those cases are, however, significantly different.

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[4]The Court also suggests that compensating state employees through tax exemptions rather than through increased pension benefits discriminates against federal taxpayers by reducing the pension income subject to federal taxation. See *ante*, at 815, n. 4. But retired state employees are not alone in receiving a subsidy through a tax exemption. Michigan, like most States, provides tax exemptions to select industries and groups. See, *e. g.*, Mich. Comp. Laws Ann. § 205.54a(g) (West 1986 and Supp. 1988) (industrial processing), and § 205.54a(p) (1986) (pollution control). That the State chooses to proceed by indirect subsidy rather than direct subsidy, however, should not render the tax invalid under the Supremacy Clause.

Phillips involved a tax that applied only to lessees of federal property. Article 5248 of the Texas Code imposed a tax on lessees of federal lands measured by the value of the fee held by the United States. Article 7173 of the Code, the only other provision that authorized a tax on lessees, either granted an exemption to lessees of other public lands or taxed them at a lower rate. Lessees of privately owned property paid no tax at all.[5] The company argued that "because Article 5248 applies only to private users of federal property, it is invalid for that reason, without more." 361 U. S., at 382. The Court rejected that argument, reasoning that it was "necessary to determine how other taxpayers similarly situated are treated." *Id.*, at 383. It then defined the relevant classes of "similarly situated" taxpayers as the federal lessees who were taxed under Article 5248 and the lessees of other public property taxed under Article 7173. Within that narrow focus, the Court rejected the school district's argument that the discrimination between the two classes could be justified. Because the Court confined its analysis to the two state taxes that applied to lessees of public property, its reasoning would be controlling in the case before us today if Michigan's income tax applied only to public employees; on that hypothesis, if state employees were exempted, the tax would obviously discriminate against federal employees.

The troublesome aspect of the Court's opinion in *Phillips* is its failure to attach any significance to the fact that the tax on private landlords presumably imposed an indirect burden on

[5] "Although Article 7173 is, in terms, applicable to all lessees who hold tax-exempt property under a lease for a term of three years or more, it appears that only lessees of *public* property fall within this class in Texas. Tax exemptions for real property owned by private organizations—charities, churches, and similar entities—do not survive a lease to a business lessee. The full value of the leased property becomes taxable to the owner, and the lessee's indirect burden consequently is as heavy as the burden imposed directly on federal lessees by Article 5248." 361 U. S., at 380–381 (emphasis in original; footnote omitted).

their lessees that was as heavy as the direct burden on federal lessees imposed by Article 5248. The Court did note that "[u]nder these circumstances, there appears to be no discrimination between the Government's lessees and lessees of private property." *Id.*, at 381. But—possibly because of the school district's rather unwise reliance on an equal protection analysis of the case[6]—the Court never even considered the question whether the political check provided by private property owners was sufficient to save that tax from the claim that it singled out federal lessees for an unconstitutional tax burden.[7]

In *Memphis Bank & Trust Co.*, the question presented was the lawfulness of a Tennessee tax on the net earnings of

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[6] "The School District addresses this problem, essentially, as one of equal protection, and argues that we must uphold the classification, though apparently discriminatory, 'if any state of facts reasonably can be conceived that would sustain it.' *Allied Stores* v. *Bowers*, 358 U. S. 522, 528." *Id.*, at 383.

[7] An interesting feature of the *Phillips* opinion is its reference to the fact that the tax upheld in *United States* v. *City of Detroit*, 355 U. S. 466 (1958), had actually included an exemption for school-owned property—and therefore discriminated "against" federal property in the same way the tax involved in this case discriminates "against" federal employees.

"This argument misconceives the scope of the Michigan decisions. In those cases we did not decide—in fact, we were not asked to decide—whether the exemption of school-owned property rendered the statute discriminatory. Neither the Government nor its lessees, to whom the statute was applicable, claimed discrimination of this character." *Phillips Chemical Co.* v. *Dumas Independent School Dist.*, 361 U. S., at 386.

The Court's description of the relevant class of property subject to tax in the *Detroit* case obviously would have provided the same political check against discrimination regardless of how the school property might have been classified. In *Detroit*, Justice Black described that class as follows:

"But here the tax applies to every private party who uses exempt property in Michigan in connection with a business conducted for private gain. Under Michigan law this means persons who use property owned by the Federal Government, the State, its political subdivisions, churches, charitable organizations and a great host of other entities. The class defined is not an arbitrary or invidiously discriminatory one." 355 U. S., at 473.

banks doing business in the State that defined net earnings to "include interest received by the bank on the obligations of the United States and its instrumentalities, as well as interest on bonds and other obligations of States other than Tennessee, but [to] exclude interest on obligations of Tennessee and its political subdivisions." 459 U. S., at 394. Although the federal obligations were part of a large class and the tax therefore did not discriminate only against the income derived from a federal source, all other members of the disfavored class were also unrepresented in the Tennessee Legislature. There was, therefore, no political check to protect the out-of-state issuers, including the federal instrumentalities, from precisely the same kind of discrimination involved in *McCulloch* v. *Maryland*. Indeed, in the *McCulloch* case itself, the taxing statute did not, in terms, single out the National Bank for disfavored treatment; the tax was imposed on "all Banks, or branches thereof, in the State of Maryland, *not chartered by the legislature*." 4 Wheat., at 317–318. A tax that discriminates against a class of nonresidents, including federal instrumentalities, clearly is not protected by the political check that saved the state taxes in cases like *United States* v. *County of Fresno*, 429 U. S. 452 (1977), and *City of Detroit* v. *Murray Corp.*, 355 U. S. 489 (1958).

When the Court rejected the claim that a federal employee's income is immune from state taxation in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939), Justice Frankfurter wrote separately to explain how a "seductive cliché" had infected the doctrine of intergovernmental immunity, which had been "moving in the realm of what Lincoln called 'pernicious abstractions.'" He correctly noted that only a "web of unreality" could explain how the "[f]ailure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other." *Id.*, at 489–490.

Today, it is not the great Chief Justice's dictum about how the power to tax includes the power to destroy that obscures the issue in a web of unreality; it is the virtually automatic rejection of anything that can be labeled "discriminatory." The question in this case deserves more careful consideration than is provided by the mere use of that label. It should be answered by considering whether the *ratio decidendi* of our holding in *McCulloch* v. *Maryland* is applicable to this quite different case. It is not. I, therefore, respectfully dissent.

Syllabus

FRAZEE *v.* ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY ET AL.

APPEAL FROM THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

No. 87–1945. Argued March 1, 1989—Decided March 29, 1989

Appellant, who refused a temporary retail position because the job would have required him to work on Sunday in violation of his personal religious beliefs, applied for, and was denied, unemployment compensation benefits. The denial was affirmed by an administrative review board, an Illinois Circuit Court, and the State Appellate Court, which found that since appellant was not a member of an established religious sect or church and did not claim that his refusal to work resulted from a tenet, belief, or teaching of an established religious body, his personal professed religious belief, although unquestionably sincere, was not good cause for his refusal to work on Sunday.

Held: The denial of unemployment compensation benefits to appellant on the ground that his refusal to work was not based on tenets or dogma of an established religious sect violated the Free Exercise Clause of the First Amendment as applied to the States through the Fourteenth Amendment. *Sherbert* v. *Verner*, 374 U. S. 398, *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, and *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U. S. 136, rested on the fact that each of the claimants had a sincere belief that religion required him or her to refrain from the work in question, not on the consideration that each of them was a member of a particular religious sect or on any tenet of the sect forbidding such work. While membership in a sect would simplify the problem of identifying sincerely held beliefs, the notion that one must be responding to the commands of a particular religious organization to claim the protection of the Free Exercise Clause is rejected. The sincerity or religious nature of appellant's belief was not questioned by the courts below and was conceded by the State, which offered no justification for the burden that the denial of benefits placed on appellant's right to exercise his religion. The fact that Sunday work has become a way of life does not constitute a state interest sufficiently compelling to override a legitimate free-exercise claim, since there is no evidence that there will be a mass movement away from Sunday employment if appellant succeeds on his claim. Pp. 832–835.

159 Ill. App. 3d 474, 512 N. E. 2d 789, reversed and remanded.

WHITE, J., delivered the opinion for a unanimous Court.

David A. French argued the cause for appellant. With him on the briefs was *John W. Whitehead.*

Robert J. Ruiz, Solicitor General of Illinois, argued the cause for appellees. With him on the brief were *Neil F. Hartigan*, Attorney General, and *Diane Curry Grapsas* and *Marcy I. Singer*, Assistant Attorneys General.*

JUSTICE WHITE delivered the opinion of the Court.

The Illinois Unemployment Insurance Act provides that "[a]n individual shall be ineligible for benefits if he has failed, without good cause, either to apply for available, suitable work when so directed . . . or to accept suitable work when offered him . . . ." Ill. Rev. Stat., ch. 48, ¶433 (1986). In April 1984, William Frazee refused a temporary retail position offered him by Kelly Services because the job would have required him to work on Sunday. Frazee told Kelly that, as a Christian, he could not work on "the Lord's day." Frazee then applied to the Illinois Department of Employment Security for unemployment benefits claiming that there was good cause for his refusal to work on Sunday. His application was denied. Frazee appealed the denial of benefits to the Department of Employment Security's Board of Review, which also denied his claim. The Board of Review stated: "When a refusal of work is based on religious convictions, the refusal must be based upon some tenets or dogma accepted by the individual of some church, sect, or denomination, and such a refusal based solely on an individual's personal belief is personal and noncompelling and does not render the work un-

*Briefs of *amici curiae* urging reversal were filed for the American Jewish Congress et al. by *Amy Adelson*, *Lois C. Waldman*, and *Marc D. Stern;* for the Anti-Defamation League of B'nai B'rith by *Steven M. Freeman*, *Meyer Eisenberg*, *Jeffrey P. Sinensky*, *Jill L. Kahn*, and *Richard E. Shevitz;* for the Council on Religious Freedom et al. by *Lee Boothby*, *Samuel Rabinove*, *Richard T. Foltin*, *Robert W. Nixon*, and *Rolland Truman;* and for Robert Roesser et al. by *Bruce N. Cameron.*

suitable." App. 18–19. The Board of Review concluded that Frazee had refused an offer of suitable work without good cause. The Circuit Court of the Tenth Judicial Circuit of Illinois, Peoria County, affirmed, finding that the agency's decision was "not contrary to law nor against the manifest weight of the evidence," thereby rejecting Frazee's claim based on the Free Exercise Clause of the First Amendment. *Id.*, at 23.

Frazee's free exercise claim was again rejected by the Appellate Court of Illinois, Third District. 159 Ill. App. 3d 474, 512 N. E. 2d 789 (1987). The court characterized Frazee's refusal to work as resting on his "personal professed religious belief," and made it clear that it did "not question the sincerity of the plaintiff," *id.*, at 475, 477, 512 N. E. 2d, at 790, 791. It then engaged in a historical discussion of religious prohibitions against work on the Sabbath and, in particular, on Sunday. Nonetheless, the court distinguished *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981); and *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U. S. 136 (1987), from the facts of Frazee's case. Unlike the claimants in *Sherbert*, *Thomas*, and *Hobbie*, Frazee was not a member of an established religious sect or church, nor did he claim that his refusal to work resulted from a "tenet, belief or teaching of an established religious body." 159 Ill. App. 3d, at 477, 512 N. E. 2d, at 791. To the Illinois court, Frazee's position that he was "a Christian" and as such felt it wrong to work on Sunday was not enough. For a Free Exercise Clause claim to succeed, said the Illinois Appellate Court, "the injunction against Sunday labor must be found in a tenet or dogma of an established religious sect. [Frazee] does not profess to be a member of any such sect." *Id.*, at 478–479, 512 N. E. 2d, at 792. The Illinois Supreme Court denied Frazee leave to appeal.

The mandatory appellate jurisdiction of this Court was invoked under 28 U. S. C. § 1257(2), since the state court

rejected a challenge to the constitutionality of Illinois' statutory "good cause" requirement as applied in this case. We noted probable jurisdiction, 488 U. S. 814 (1988), and now reverse.

We have had more than one occasion before today to consider denials of unemployment compensation benefits to those who have refused work on the basis of their religious beliefs. In *Sherbert* v. *Verner*, *supra*, at 410, the Court held that a State could not "constitutionally apply the eligibility provisions [of its unemployment-compensation program] so as to constrain a worker to abandon his religious convictions respecting the day of rest." *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, *supra*, also held that the State's refusal to award unemployment compensation benefits to one who terminated his job because his religious beliefs forbade participation in the production of armaments violated the First Amendment right to free exercise. Just two years ago, in *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, *supra*, Florida's denial of unemployment compensation benefits to an employee discharged for her refusal to work on her Sabbath because of religious convictions adopted subsequent to employment was also declared to be a violation of the Free Exercise Clause. In each of these cases, the appellant was "forced to choose between fidelity to religious belief and . . . employment," *id.*, at 144, and we found "the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice," *ibid.* In each of these cases, we concluded that the denial of unemployment compensation benefits violated the Free Exercise Clause of the First Amendment of the Constitution, as applied to the States through the Fourteenth Amendment.

It is true, as the Illinois court noted, that each of the claimants in those cases was a member of a particular religious sect, but none of those decisions turned on that consideration or on any tenet of the sect involved that forbade the work the

claimant refused to perform. Our judgments in those cases rested on the fact that each of the claimants had a sincere belief that religion required him or her to refrain from the work in question. Never did we suggest that unless a claimant belongs to a sect that forbids what his job requires, his belief, however sincere, must be deemed a purely personal preference rather than a religious belief. Indeed, in *Thomas*, there was disagreement among sect members as to whether their religion made it sinful to work in an armaments factory; but we considered this to be an irrelevant issue and hence rejected the State's submission that unless the religion involved formally forbade work on armaments, Thomas' belief did not qualify as a religious belief. Because Thomas unquestionably had a sincere belief that his religion prevented him from doing such work, he was entitled to invoke the protection of the Free Exercise Clause.

There is no doubt that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause," *Thomas*, *supra*, at 713. Purely secular views do not suffice. *United States* v. *Seeger*, 380 U. S. 163 (1965); *Wisconsin* v. *Yoder*, 406 U. S. 205, 215–216 (1972). Nor do we underestimate the difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held. States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause. We do not face problems about sincerity or about the religious nature of Frazee's convictions, however. The courts below did not question his sincerity, and the State concedes it. Tr. of Oral Arg. 35. Furthermore, the Board of Review characterized Frazee's views as "religious convictions," App. 18, and the Illinois Appellate Court referred to his refusal to work on Sunday as based on a "personal professed religious belief," 159 Ill. App. 3d, at 475, 512 N. E. 2d, at 790.[1]

[1] From the very first report of the Illinois Division of Unemployment Insurance claims adjudicator, Frazee's refusal of Sunday work has been de-

Frazee asserted that he was a Christian, but did not claim to be a member of a particular Christian sect. It is also true that there are assorted Christian denominations that do not profess to be compelled by their religion to refuse Sunday work, but this does not diminish Frazee's protection flowing from the Free Exercise Clause. *Thomas* settled that much. Undoubtedly, membership in an organized religious denomination, especially one with a specific tenet forbidding members to work on Sunday, would simplify the problem of identifying sincerely held religious beliefs, but we reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization. Here, Frazee's refusal was based on a sincerely held religious belief. Under our cases, he was entitled to invoke First Amendment protection.[2]

The State does not appear to defend this aspect of the decision below. In its brief and at oral argument, the State conceded that the Free Exercise Clause does not demand adherence to a tenet or dogma of an established religious sect. Instead, the State proposes its own test for identifying a "religious" belief, asserts that Frazee has not met such a test, and asks that we affirm on this basis. We decline to address this submission; for as the case comes to us, Frazee's conviction was recognized as religious but found to be inadequate

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scribed as "due to his religious convictions." In his application for reconsideration of the referee's determination, Frazee stated: "I refused the job which required me to work on Sunday based on Biblical principles, scripture Exodus 20: 8, 9, 10. Remember the Sabbath day by keeping it holy. Six days you shall labour and do all your work but the seventh day is a Sabbath to the Lord your God. On it you shall not do any work."

[2] We noted in *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 715 (1981), that an asserted belief might be "so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause." But that avails the State nothing in this case. As the discussion of the Illinois Appellate Court itself indicates, claims by Christians that their religion forbids Sunday work cannot be deemed bizarre or incredible.

because it was not claimed to represent a tenet of a religious organization of which he was a member. That ground for decision was clearly erroneous.

The State offers no justification for the burden that the denial of benefits places on Frazee's right to exercise his religion. The Illinois Appellate Court ascribed great significance to America's weekend way of life. The Illinois court asked: "What would Sunday be today if professional football, baseball, basketball, and tennis were barred. Today Sunday is not only a day for religion, but for recreation and labor. Today the supermarkets are open, service stations dispense fuel, utilities continue to serve the people and factories continue to belch smoke and tangible products," concluding that "[i]f all Americans were to abstain from working on Sunday, chaos would result." 159 Ill. App. 3d, at 478, 512 N. E. 2d, at 792. We are unpersuaded, however, that there will be a mass movement away from Sunday employ if William Frazee succeeds in his claim.

As was the case in *Thomas* where there was "no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create 'widespread unemployment,' or even to seriously affect unemployment," 450 U. S., at 719, there is nothing before us in this case to suggest that Sunday shopping, or Sunday sporting, for that matter, will grind to a halt as a result of our decision today. And, as we have said in the past, there may exist state interests sufficiently compelling to override a legitimate claim to the free exercise of religion. No such interest has been presented here.

The judgment of the Appellate Court of Illinois for the Third District is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

ZANT, WARDEN *v.* MOORE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87-1104. Argued November 29, 1988—Decided March 29, 1989
824 F. 2d 847, vacated and remanded.

Susan V. Boleyn, Senior Assistant Attorney General of Georgia, argued the cause for petitioner. With her on the briefs were *Michael J. Bowers*, Attorney General, *Marion O. Gordon*, First Assistant Attorney General, and *William B. Hill, Jr.*, Senior Assistant Attorney General.

John Charles Boger argued the cause for respondent. With him on the brief were *Daniel J. Givelber* and *Julius L. Chambers*.*

PER CURIAM.

The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Teague* v. *Lane*, *ante*, p. 288.

JUSTICE BRENNAN, concurring.

While I concur in the disposition of this case, I share JUSTICE BLACKMUN's concern as to whether petitioner should be permitted to raise the retroactivity issue at this point in the proceedings. In my view this is a matter for the Court of Appeals to address in the first instance, when it reconsiders the case in light of our recent decision in *Teague* v. *Lane*, *ante*, p. 288.

JUSTICE BLACKMUN, dissenting.

I would dismiss the petition for certiorari as having been improvidently granted, rather than vacate and remand the

**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

case for reconsideration in the light of *Teague* v. *Lane*, *ante*, p. 288. The Court's discussion of retroactivity in *Teague*, to be sure, could have some bearing on the issues in this case. But petitioner did not raise nonretroactivity as a defense to respondent's claim for federal habeas relief, and that defense therefore should be deemed waived.

In *Teague*, the Court did not consider the claim of nonretroactivity to have been waived. Instead, it addressed retroactivity as a threshold matter. But that approach was dictated by the posture of the case. The petitioner in *Teague* sought the announcement of a new rule of constitutional law to be applied for the first time in his case. It was this Court's judgment that no new rule of law should be announced in the first instance in a habeas case if similarly situated habeas petitioners could not benefit from that rule because of established principles of nonretroactivity. The present litigation is in a different posture in that respondent here did not seek the announcement of a new rule of constitutional law in his case in the first instance. I see no reason to give petitioner a second opportunity to interject the issue of nonretroactivity as a defense.

In any event, I must assume that it is not the thrust of this Court's order to prejudge the availability of a retroactivity defense. That issue is for the Court of Appeals on remand.

OKLAHOMA TAX COMMISSION *v.* GRAHAM ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 88–266. Argued February 21, 1989—Decided March 29, 1989

Respondent Chickasaw Nation owns and operates a motor inn in Oklahoma at which it conducts bingo games and sells cigarettes. After the State filed a state-court suit against the Tribe and respondent inn manager to collect unpaid state taxes on these activities, the Tribe, asserting federal-question jurisdiction, removed the action to the Federal District Court. The State's motion to remand the case on the ground that the complaint alleged only state statutory violations and state tax liabilities was denied by the District Court, which held that the complaint implicated the federal question of tribal immunity since it sought to apply state law to an Indian Tribe. Thereafter, the court dismissed the suit, finding it barred by tribal sovereign immunity. The Court of Appeals affirmed, noting that, as a prerequisite to stating jurisdiction over an Indian tribe, an alleged waiver or consent to suit is a necessary element of a well-pleaded complaint. The court adhered to that disposition on remand from this Court, finding that the rule of *Caterpillar Inc.* v. *Williams*, 482 U. S. 386—that to support federal-question removability, a complaint on its face must present a federal claim—did not apply to the State's complaint. The court found that, although nothing within the complaint's literal language suggested the implication of a federal question, such a question was inherent within the complaint because of the parties subject to the action.

Held: This case was improperly removed from the Oklahoma courts. The Court of Appeals' decision is plainly inconsistent with *Caterpillar*. The possible existence of a federal tribal immunity defense to the State's claims did not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law. And there was no independent basis for original federal jurisdiction to support removal. This jurisdictional question is not affected by the fact that tribal immunity is governed by federal law, since Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities.

846 F. 2d 1258, reversed.

David Allen Miley argued the cause *pro hac vice* for petitioner. With him on the briefs was *Stanley J. Alexander.*

Bob Rabon argued the cause and filed a brief for respondents.*

PER CURIAM.

The Chickasaw Nation owns and operates the Chickasaw Motor Inn in Sulphur, Oklahoma. At the inn, the Tribe conducts bingo games and sells cigarettes. Oklahoma filed a complaint against the Chickasaw Tribe and Jan Graham, who managed the enterprise for the Tribe, to collect unpaid state excise taxes on the sale of cigarettes and taxes on the receipts from the bingo games. The Chickasaw Nation, asserting federal-question jurisdiction under 28 U. S. C. § 1331, removed the action from the State District Court in Murray County to the United States District Court for the Eastern District of Oklahoma. The State moved to remand the case, arguing in part that the complaint alleged on its face only state statutory violations and state tax liabilities. The District Court, however, denied the motion. It noted that the complaint sought to apply Oklahoma law to an Indian Tribe and so implicated the federal question of tribal immunity. App. to Pet. for Cert. A25–A26. Shortly thereafter the District Court dismissed the State's suit, finding it barred by tribal sovereign immunity. *Id.*, at A27–A30.

A divided panel of the Tenth Circuit affirmed. *Oklahoma ex rel. Oklahoma Tax Comm'n* v. *Graham*, 822 F. 2d 951 (1987). The majority concluded that removal had been proper because the State's complaint, although facially based on state law, contained the "implicit federal question" of

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*Briefs of *amici curiae* urging affirmance were filed for the Otoe-Missouria Tribe of Indians by *F. Browning Pipestem;* for the Sac and Fox Nation et al. by *G. William Rice;* for the Seneca Nation of Indians et al. by *Reid Peyton Chambers* and *William R. Perry;* and for the Wyandotte Tribe of Oklahoma et al. by *Glenn M. Feldman.*

Dennis W. Arrow filed a brief for the Inter-Tribal Council of the Five Civilized Tribes as *amicus curiae.*

tribal immunity. It noted that, as a prerequisite to stating jurisdiction over a recognized Indian tribe, it had held in other cases that "an alleged waiver or consent to suit is a necessary element of the *well-pleaded* complaint." *Id.*, at 954. Judge Tacha dissented on the ground that a case could not be removed on the basis of a federal defense and that "[i]t is not disputed that the face of the state's complaint in this case raises only state tax questions." *Id.*, at 958.

We vacated the Tenth Circuit's decision and remanded for reconsideration in light of our discussion of removal jurisdiction and the well-pleaded complaint rule in *Caterpillar Inc.* v. *Williams*, 482 U. S. 386 (1987). *Oklahoma Tax Comm'n* v. *Graham*, 484 U. S. 973 (1987). On reconsideration, the panel of the Tenth Circuit adhered to its previous disposition that removal was proper. *Oklahoma ex rel. Oklahoma Tax Comm'n* v. *Graham*, 846 F. 2d 1258 (1988). The court read *Caterpillar* as holding that, to support federal-question removability, a complaint must on its face present a federal claim. But that rule did not apply to Oklahoma's complaint, thought the panel, because, although "nothing within the *literal* language of the pleading even suggests implication of a federal question," "such a question is inherent within the complaint because of the parties subject to the action." 846 F. 2d, at 1260. Again, Judge Tacha dissented. We granted certiorari, 488 U. S. 816 (1988).

We think the decision of the Court of Appeals is plainly inconsistent with *Caterpillar* and reverse it. "Except as otherwise expressly provided by Act of Congress," a case is not properly removed to federal court unless it might have been brought there originally. 28 U. S. C. § 1441(a). In the present case, the sole alleged basis of original federal jurisdiction is 28 U. S. C. § 1331, giving district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint" rule. "[W]hether a case is one aris-

ing under [federal law], in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor* v. *Anderson*, 234 U. S. 74, 75–76 (1914); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149 (1908).

In *Caterpillar*, we ruled that the application of the well-pleaded complaint rule defeated federal-question jurisdiction, and therefore removability, in a case in which employees sued on personal, state-law employment contracts. We refused to characterize these state-law claims as arising under federal law even though an interpretation of the collective-bargaining agreement might ultimately provide the employer a complete defense to the individual claims, and even though employee claims on the collective-bargaining agreement would have been the subject of original federal jurisdiction. *Caterpillar*, *supra*, at 396–398. The state-law tax claims in the present case must be analyzed in the same manner. Tribal immunity may provide a federal defense to Oklahoma's claims. See *Puyallup Tribe, Inc.* v. *Washington Game Dept.*, 433 U. S. 165 (1977). But it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law. *Gully* v. *First National Bank*, 299 U. S. 109 (1936). The possible existence of a tribal immunity defense, then, did not convert Oklahoma tax claims into federal questions, and there was no independent basis for original federal jurisdiction to support removal.

The jurisdictional question in this case is not affected by the fact that tribal immunity is governed by federal law. As the dissent below observed, Congress has expressly provided by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities. See

Willingham v. *Morgan*, 395 U. S. 402, 406–407 (1969) (removal provision of 28 U. S. C. § 1442(a)(1) for federal officers acting "under color" of federal office sufficient to allow removal of actions in which official immunity could be asserted); *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 493, n. 20 (1983) (original federal jurisdiction under 28 U. S. C. § 1330(a) over claims against a foreign sovereign which allege an exception to immunity). Neither the parties nor the courts below have suggested that Congress has statutorily provided for federal-court adjudication of tribal immunity notwithstanding the well-pleaded complaint rule.

As this case was improperly removed from the Oklahoma courts, the merits of the claims of tribal immunity were not properly before the federal courts, and we express no opinion on that question.

The judgment of the Court of Appeals is

Reversed.

Reporter's Note

The next page is purposely numbered 1001. The numbers between 842 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM FEBRUARY 21 THROUGH MARCH 27, 1989

FEBRUARY 21, 1989

Appeals Dismissed

No. 88-669. HOFLEY MANUFACTURING CO. *v.* WILLIAMS. Appeal from Sup. Ct. Mich. Motion of appellee for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of substantial federal question. Reported below: 430 Mich. 603, 424 N. W. 2d 278.

No. 88-877. KARST *v.* WOODS. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this case.

No. 88-895. STANTON *v.* DISTRICT OF COLUMBIA COURT OF APPEALS. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88-5392. BULLER *v.* FIRST LEASING CO. Appeal from Sup. Ct. S. D. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 428 N. W. 2d 545.

No. 88-5536. BULLER *v.* HURLEY STATE BANK. Appeal from Cir. Ct. S. D., Turner County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88-5580. WEHRINGER *v.* NEW HAMPSHIRE. Appeal from Sup. Ct. N. H. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 130 N. H. 707, 547 A. 2d 252.

No. 88-5914. IN RE WILLIAMS. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon

the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88–6180. RODRIGUES *v.* EGGER, COMMISSIONER OF INTERNAL REVENUE, ET AL. Appeal from C. A. 9th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 818 F. 2d 869.

No. 88–960. LIBERTY MOBILEHOME SALES, INC. *v.* EAMIELLO ET UX. Appeal from Sup. Ct. Conn. dismissed for want of jurisdiction. Reported below: 208 Conn. 620, 546 A. 2d 805.

No. 88–1067. KAVANAGH *v.* COVEN. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Reported below: 70 N. Y. 2d 1002, 521 N. E. 2d 445.

No. 88–1009. HOUDE ET VIR *v.* STARKWEATHER ET AL. Appeal from App. Div., Sup. Ct. N. Y., 4th Jud. Dept., dismissed for want of substantial federal question. Reported below: 143 App. Div. 2d 504, 533 N. Y. S. 2d 259.

No. 88–1059. VROOM DEVELOPMENTS (FLORIDA), INC. *v.* TOWN OF LONGBOAT KEY. Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of substantial federal question. Reported below: 531 So. 2d 974.

No. 88–1097. RICHARDS *v.* TEXAS. Appeal from Ct. App. Tex., 1st Dist., dismissed for want of substantial federal question. Reported below: 743 S. W. 2d 747.

Certiorari Granted—Vacated and Remanded

No. 87–6315. KAISER *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Broce*, 488 U. S. 563 (1989). Reported below: 833 F. 2d 1019.

No. 88–764. JONES *v.* PREUIT & MAULDIN ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Owens* v. *Okure*, 488 U. S. 235 (1989). Reported below: 851 F. 2d 1321.

Certificate Dismissed

No. 88–1179. UNITED STATES *v.* FAFOWORA. Certificate from C. A. D. C. Cir. Question certified by the United States

Court of Appeals for the District of Columbia Circuit dismissed. Reported below: 275 U. S. App. D. C. 141, 865 F. 2d 360.

Miscellaneous Orders. (See also No. 88–5890, *ante*, p. 180.)

No. — — ——. MAURICE M. *v.* BOUKNIGHT. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. A–524. AARON *v.* JONES, WARDEN, ET AL. Application for bail, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–567. ASSOCIATED GENERAL CONTRACTORS OF AMERICA ET AL. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, ET AL. (No. 88–1070); and ASSOCIATED BUILDERS & CONTRACTORS, INC., ET AL. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, ET AL. (two cases) (No. 88–1075). C. A. 3d Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–582. EUBANKS ET AL. *v.* WILKINSON, GOVERNOR OF KENTUCKY, ET AL. D. C. W. D. Ky. Application for stay pending appeal to the United States Court of Appeals for the Sixth Circuit, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. A–641. SHORT *v.* KLEIN, GUARDIAN OF KLEIN, ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Application for stay, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. A–642. CARDEN ET AL. *v.* ARKOMA ASSOCIATES. Application for stay of enforcement of the mandate of the United States Court of Appeals for the Fifth Circuit, presented to JUSTICE WHITE, and by him referred to the Court, granted pending the timely filing and disposition of a petition for writ of certiorari. This order is conditioned upon the posting of a good and sufficient security with the Clerk of the United States District Court for the Eastern District of Louisiana, the adequacy of such security to be determined by a judge of that court.

No. D–737. IN RE DISBARMENT OF WEATHERLY. Motion to defer consideration denied. Disbarment entered. [For earlier order herein, see 488 U. S. 906.]

No. D–738. IN RE DISBARMENT OF BURKE. Disbarment entered. [For earlier order herein, see 488 U. S. 906.]

No. D–744. IN RE DISBARMENT OF HECHT. Motion to defer consideration denied. Disbarment entered. [For earlier order herein, see 488 U. S. 963.]

No. D–745. IN RE DISBARMENT OF DENKER. Disbarment entered. [For earlier order herein, see 488 U. S. 963.]

No. D–747. IN RE DISBARMENT OF WILLIAMS. Disbarment entered. [For earlier order herein, see 488 U. S. 978.]

No. D–752. IN RE DISBARMENT OF ALBIN. Disbarment entered. [For earlier order herein, see 488 U. S. 1026.]

No. D–766. IN RE DISBARMENT OF HALPER. It is ordered that Donald Kenneth Halper, of Sherman Oaks, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–767. IN RE DISBARMENT OF ESTON. It is ordered that Leonard Raymond Eston, of Detroit, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–768. IN RE DISBARMENT OF SANDERS. It is ordered that Samuel Henry Sanders III, of Birmingham, Ala., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–769. IN RE DISBARMENT OF SMITH. It is ordered that William Trickett Smith, of Harrisburg, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–770. IN RE DISBARMENT OF MATTHEWS. It is ordered that Michael Joseph Matthews, of Gonzales, La., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for approval of fees and expenses granted, and the River Master is awarded $5,154.73 for the period July 1 through December 31, 1988, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 488 U. S. 921.]

No. 105, Orig. KANSAS *v.* COLORADO. Motion to refer to the Special Master the motion for leave to amend the complaint granted. [For earlier order herein, see, *e. g.*, 488 U. S. 978.]

No. 109, Orig. OKLAHOMA ET AL. *v.* NEW MEXICO. Motion of New Mexico for leave to file a supplemental answer granted. Motion of the Special Master for award of fees and expenses granted, and the Special Master is awarded $22,744.99 to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 488 U. S. 989.]

No. 111, Orig. DELAWARE *v.* NEW YORK. Motion of Texas for leave to file complaint in intervention granted. The parties are allowed 60 days within which to answer. [For earlier order herein, see, *e. g.*, 488 U. S. 990.]

No. 87–1589. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL.; and

No. 87–1888. PITTSBURGH & LAKE ERIE RAILROAD CO. *v.* RAILWAY LABOR EXECUTIVES' ASSN. ET AL. C. A. 3d Cir. [Certiorari granted, 488 U. S. 965.] Motion of respondent Interstate Commerce Commission for divided argument denied. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted to be divided as follows: 30 minutes for petitioner; 30 minutes for respondent; and 30 minutes for the Acting Solicitor General, as *amicus curiae*.

No. 87–1759. TEXAS STATE TEACHERS ASSN. ET AL. *v.* GARLAND INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. [Certiorari granted, 488 U. S. 815.] Motion of Texas Association of School Boards et al. for leave to file a brief as *amici curiae* granted.

No. 88–40. UNITED STATES *v.* ZOLIN ET AL. C. A. 9th Cir. [Certiorari granted, 488 U. S. 907.] Motion of Bernard M. Barrett, Jr., for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral

argument denied. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 88–192. MCKESSON CORP. *v.* DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, DEPARTMENT OF BUSINESS REGULATION OF FLORIDA, ET AL. Sup. Ct. Fla. [Certiorari granted, 488 U. S. 954]; and

No. 88–325. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* SMITH, DIRECTOR, ARKANSAS HIGHWAY AND TRANSPORTATION DEPARTMENT, ET AL. Sup. Ct. Ark. [Certiorari granted, 488 U. S. 954.] Motion of respondents for divided argument granted. Request for additional time for oral argument denied. Motion of petitioners for divided argument granted. Request for additional time for oral argument denied.

No. 88–305. SOUTH CAROLINA *v.* GATHERS. Sup. Ct. S. C. [Certiorari granted, 488 U. S. 888.] Motions of SOLACE et al. and Barbara Babcock et al. for leave to file briefs as *amici curiae* granted.

No. 88–389. PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO *v.* BETTS. C. A. 6th Cir. [Probable jurisdiction noted, 488 U. S. 907.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–411. MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* GIARRATANO ET AL. C. A. 4th Cir. [Certiorari granted, 488 U. S. 923.] Motions of American Civil Liberties Union, National Legal Aid & Defender Association et al., and Maryland State Bar Association et al. for leave to file briefs as *amici curiae* granted.

No. 88–420. JONES, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN AT MOBERLY *v.* THOMAS. C. A. 8th Cir. [Certiorari granted, 488 U. S. 1003.] Motion for appointment of counsel granted, and it is ordered that Springfield Baldwin, Esq., of Shrewsburg, Mo., be appointed to serve as counsel for respondent in this case.

No. 88–429. PUBLIC CITIZEN *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL.; and

No. 88–494. WASHINGTON LEGAL FOUNDATION *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. D. C. D. C. [Proba-

ble jurisdiction noted, 488 U. S. 979.] Motion of the Acting Solicitor General for divided argument denied. Motion of appellants for divided argument granted. JUSTICE SCALIA took no part in the consideration or decision of these motions.

No. 88–449. HEALY ET AL. *v.* THE BEER INSTITUTE ET AL.; and

No. 88–513. WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC. *v.* THE BEER INSTITUTE ET AL. C. A. 2d Cir. [Probable jurisdiction noted, 488 U. S. 954.] Motion of Wine & Spirits Wholesalers of America, Inc., for leave to file a brief as *amicus curiae* granted.

No. 88–454. UNITED STATES *v.* MONSANTO. C. A. 2d Cir. [Certiorari granted, 488 U. S. 941.] Motion of Committee on Criminal Advocacy et al. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 88–515. SABLE COMMUNICATIONS OF CALIFORNIA, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 88–525. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* SABLE COMMUNICATIONS OF CALIFORNIA, INC. D. C. C. D. Cal. [Probable jurisdiction noted, 488 U. S. 1003.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 88–556. BROWNING-FERRIS INDUSTRIES OF VERMONT, INC., ET AL. *v.* KELCO DISPOSAL, INC., ET AL. C. A. 2d Cir. [Certiorari granted, 488 U. S. 980.] Motions of Metromedia, Inc., and Goodyear Tire & Rubber Co. for leave to file briefs as *amici curiae* granted.

No. 88–681. CALIFORNIA STATE BOARD OF EQUALIZATION *v.* SIERRA SUMMIT, INC. C. A. 9th Cir. [Certiorari granted, 488 U. S. 992.] Motion of National Governors' Association et al. for leave to file a brief as *amici curiae* granted.

No. 88–927. KEYSTONE SHIPPING CO. *v.* NEW ENGLAND ENERGY, INC., ET AL. C. A. 1st Cir. Motion of respondents to expedite consideration of the petition for writ of certiorari denied.

No. 88–1207. G. K. C. MICHIGAN THEATRES, INC., ET AL. *v.* NATIONAL AMUSEMENTS, INC. C. A. 6th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 88–5853. CORCH *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 14, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–6060. TUCKER *v.* PRUDENTIAL INSURANCE CO. C. A. 3d Cir.; and

No. 88–6177. GARDNER *v.* UNITED STATES. C. A. 7th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 14, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 88–6131. WRENN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. C. A. 6th Cir.; and

No. 88–6263. WRENN *v.* NEW YORK CITY HEALTH & HOSPITALS CORP. ET AL. C. A. 2d Cir. Motions of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 14, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari

without reaching the merits of the motions to proceed *in forma pauperis*.

No. 88–6181. IN RE HARRISON. Ct. App. Ga. Petition for writ of common-law certiorari denied. Reported below: 187 Ga. App. 268, 370 S. E. 2d 7.

No. 88–5958. IN RE SIMANONOK;
No. 88–5988. IN RE MARTIN;
No. 88–6043. IN RE MULAZIM;
No. 88–6051. IN RE BARNETT; and
No. 88–6234. IN RE GAY. Petitions for writs of mandamus denied.

No. 88–971. IN RE DOLENZ;
No. 88–6072. IN RE YOUNGS;
No. 88–6128. IN RE JONES; and
No. 88–6227. IN RE THEODOROPOULOS. Petitions for writs of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 88–952. UNITED STATES *v.* SPERRY CORP. ET AL. Appeal from C. A. Fed. Cir. Probable jurisdiction noted. Reported below: 853 F. 2d 904.

No. 88–1048. QUINN ET AL. *v.* MILLSAP ET AL. Appeal from Sup. Ct. Mo. Probable jurisdiction noted. Reported below: 757 S. W. 2d 591.

Certiorari Granted

No. 88–124. BREININGER *v.* SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 6. C. A. 6th Cir. Certiorari granted. Reported below: 849 F. 2d 997.

No. 88–791. PAVELIC & LEFLORE *v.* MARVEL ENTERTAINMENT GROUP, A DIVISION OF CADENCE INDUSTRIES CORP., ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 854 F. 2d 1452.

No. 88–1083. JOHN DOE AGENCY ET AL. *v.* JOHN DOE CORP. C. A. 2d Cir. Certiorari granted. Reported below: 850 F. 2d 105.

No. 87–1979. CHESAPEAKE & OHIO RAILWAY CO. *v.* SCHWALB ET AL.; and

No. 88–127. NORFOLK & WESTERN RAILWAY CO. *v.* GOODE. Sup. Ct. Va. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: No. 87–1979, 235 Va. 27, 365 S. E. 2d 742.

No. 88–512. MICHIGAN *v.* HARVEY. Ct. App. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted.

No. 88–840. GOLDEN STATE TRANSIT CORP. *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari granted limited to the following question: "Whether in the absence of a direct violation of a federal statute, an allegation that a state statute is preempted by a federal statute is cognizable under 42 U. S. C. § 1983?" Reported below: 857 F. 2d 631.

No. 88–5909. MCKOY *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 323 N. C. 1, 372 S. E. 2d 12.

No. 88–6075. JAMES *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 123 Ill. 2d 523, 528 N. E. 2d 723.

Certiorari Denied. (See also Nos. 88–877, 88–895, 88–5392, 88–5536, 88–5580, 88–5914, 88–6180, and 88–6181, *supra.*)

No. 88–541. NORTH CAROLINA *v.* TARANTINO. Sup. Ct. N. C. Certiorari denied. Reported below: 322 N. C. 386, 368 S. E. 2d 588.

No. 88–614. 9/1 KG CONTAINERS, MORE OR LESS, OF AN ARTICLE OF DRUG FOR VETERINARY USE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 854 F. 2d 173.

No. 88–687. LIBERTY LOBBY, INC. *v.* REES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 271 U. S. App. D. C. 297, 852 F. 2d 595.

No. 88–701. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, DISTRICT LODGE NO. 19 *v.* SOO LINE RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 850 F. 2d 368.

No. 88–753. UNIVERSAL COOPERATIVES, INC. *v.* FCX, INC. C. A. 4th Cir. Certiorari denied. Reported below: 853 F. 2d 1149.

No. 88–768. FRANCO *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1292.

No. 88–778. WORLD COLOR PRESS, INC. *v.* DOLE, SECRETARY OF LABOR, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 269 U. S. App. D. C. 162, 843 F. 2d 1490.

No. 88–792. MILLER *v.* PERSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 854 F. 2d 656.

No. 88–795. JUDGE ET AL. *v.* UNITED STATES DEPARTMENT OF AGRICULTURE. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 199.

No. 88–803. ANTHONY *v.* NEWMAN, ACTING SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. D. C. Cir. Certiorari denied. Reported below: 270 U. S. App. D. C. 246, 848 F. 2d 1278.

No. 88–807. CHILDS ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 844 F. 2d 791.

No. 88–830. QUALITY INN SOUTH ET AL. *v.* PATEL. C. A. 11th Cir. Certiorari denied. Reported below: 846 F. 2d 700.

No. 88–839. ARRUZA *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 26 M. J. 234.

No. 88–846. SPARKS *v.* CHARACTER AND FITNESS COMMITTEE OF KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 428.

No. 88–848. AMERICAN MINING CONGRESS ET AL. *v.* ENVIRONMENTAL DEFENSE FUND ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 271 U. S. App. D. C. 349, 852 F. 2d 1316.

No. 88–851. PIDCOCK *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 306 Ore. 335, 759 P. 2d 1092.

No. 88–853. BMT COMMODITY CORP. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1285.

No. 88–857. ROSZKOS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 850 F. 2d 514.

No. 88–858. WELLS, ADMINISTRATRIX OF THE ESTATE OF SANDERLIN, ET AL. *v.* WALKER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 852 F. 2d 368.

No. 88–865. SUN EXPLORATION & PRODUCTION CO. ET AL. *v.* LUJAN, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 848 F. 2d 1441.

No. 88–866. QUANTUM CHEMICAL CORP. *v.* PRATT; and
No. 88–1078. PRATT *v.* QUANTUM CHEMICAL CORP. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 1329.

No. 88–873. SHROEDER *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 27 M. J. 87.

No. 88–875. TAYLOR *v.* TAYLOR. Super. Ct. Pa. Certiorari denied. Reported below: 373 Pa. Super. 648, 536 A. 2d 834.

No. 88–878. ROBERTS *v.* HARDIN. C. A. 6th Cir. Certiorari denied. Reported below: 852 F. 2d 568.

No. 88–879. LOWEN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 91 Ore. App. 187, 754 P. 2d 632.

No. 88–880. TRUMP ET AL. *v.* FIELD. C. A. 2d Cir. Certiorari denied. Reported below: 850 F. 2d 938.

No. 88–886. TAYLOR MADE OFFICE SYSTEMS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 1479.

No. 88–887. CUEVAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 847 F. 2d 1417.

No. 88–889. MILLERS NATIONAL INSURANCE CO. ET AL. *v.* AXEL'S EXPRESS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 851 F. 2d 267.

No. 88–891. HOLEMAN *v.* DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY FOR THE NATIONAL FLOOD INSURANCE

PROGRAM. C. A. 5th Cir. Certiorari denied. Reported below: 857 F. 2d 789.

No. 88-913. CALIFORNIA *v.* ALLISON. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 202 Cal. App. 3d 1084, 249 Cal. Rptr. 218.

No. 88-916. MITCHELL ET AL. *v.* FRANK R. HOWARD MEMORIAL HOSPITAL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 853 F. 2d 762.

No. 88-921. NETSKY, EXECUTOR OF THE ESTATE OF NETSKY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 859 F. 2d 1.

No. 88-922. HEILY *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 202 Cal. App. 3d 255, 248 Cal. Rtpr. 673.

No. 88-923. HOWELL *v.* HOMECRAFT LAND DEVELOPMENT, INC., ET AL. Sup. Ct. Tex. Certiorari denied.

No. 88-925. HARRIS ET AL. *v.* ISRAELITE BIBLE CLASS, INC. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 88-933. HEMMERT SHIPPING CORP. ET AL. *v.* FURNESS WITHY (CHARTERING) PANAMA, INC. C. A. 11th Cir. Certiorari denied. Reported below: 854 F. 2d 410.

No. 88-935. SCKOLNICK *v.* WELLS. C. A. 1st Cir. Certiorari denied.

No. 88-936. SCHWARZ *v.* CITY OF WARWICK, RHODE ISLAND, ET AL. C. A. 1st Cir. Certiorari denied.

No. 88-939. LEON, PERSONAL REPRESENTATIVE OF THE ESTATE OF MORALES *v.* AVINO, COUNTY MANAGER OF METROPOLITAN DADE COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 848 F. 2d 1145.

No. 88-942. LABOURE ASSOCIATES PERSONNEL SERVICES, INC. *v.* WHITMIRE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 1319.

No. 88-943. BARROW *v.* WALKER, TAX COLLECTOR, COLUMBIA COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 845 F. 2d 1030.

No. 88-945. ERVIN *v.* COUNTY OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. Reported below: 848 F. 2d 1018.

No. 88-946. APLIN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 531 So. 2d 63.

No. 88-954. LACZAY ET UX. *v.* ROSS ADHESIVES, A DIVISION OF CONROS CORP., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 855 F. 2d 351.

No. 88-956. LSLJ PARTNERSHIP *v.* FRITO-LAY, INC. C. A. 7th Cir. Certiorari denied. Reported below: 860 F. 2d 1082.

No. 88-957. TOUSSAINT *v.* LAURENS COUNTY HEALTH CARE SYSTEM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 857 F. 2d 1469.

No. 88-961. SCHMIDT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 188 Ga. App. 85, 372 S. E. 2d 440.

No. 88-962. VARMA ET AL. *v.* BLOUSTEIN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1077.

No. 88-964. HOWES *v.* NORTH DAKOTA WORKERS COMPENSATION BUREAU ET AL. Sup. Ct. N. D. Certiorari denied. Reported below: 429 N. W. 2d 730.

No. 88-965. EWELL ET AL. *v.* THOMPSON, COMMISSIONER OF CONSERVATION AND ASSISTANT SECRETARY, OFFICE OF CONSERVATION OF LOUISIANA, ET AL. Sup. Ct. La. Certiorari denied. Reported below: 525 So. 2d 1050.

No. 88-970. ROSELIN *v.* ARAIN. Super. Ct. N. J., App. Div. Certiorari denied.

No. 88-972. MAISONET *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 16 Conn. App. 89, 546 A. 2d 951.

No. 88-976. LANDANO *v.* RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 2d 569.

No. 88-981. LAWSON ET UX., INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, LAWSON ET AL. *v.* DIAMOND M CO. C. A. 5th Cir. Certiorari denied. Reported below: 856 F. 2d 189.

No. 88–983. LACEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 857 F. 2d 1475.

No. 88–985. TECHNOGRAPH LIQUIDATING TRUST *v.* GENERAL MOTORS CORP. C. A. 3d Cir. Certiorari denied. Reported below: 857 F. 2d 197.

No. 88–987. HESSE *v.* BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 848 F. 2d 748.

No. 88–991. U. S. ROOFING CORP. *v.* OWENS-CORNING FIBERGLAS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 458.

No. 88–993. LINKOUS *v.* LINKOUS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 88–997. HIGGINS *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 27 M. J. 150.

No. 88–1001. OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* CONOCO, INC. C. A. 10th Cir. Certiorari denied.

No. 88–1002. BROIDA *v.* NEWBOLD. C. A. 11th Cir. Certiorari denied. Reported below: 854 F. 2d 1324.

No. 88–1004. CAMBRIDGE PROPERTIES, INC. *v.* BATON ROUGE PRODUCTION CREDIT ASSN. C. A. 5th Cir. Certiorari denied. Reported below: 859 F. 2d 918.

No. 88–1005. HAYNES *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 111 Wash. 2d 250, 758 P. 2d 7.

No. 88–1006. JAYNES *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 88–1007. LINN *v.* PIERCE, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. C. A. 7th Cir. Certiorari denied. Reported below: 860 F. 2d 1082.

No. 88–1010. LANDAHL, BROWN & WEED ASSOCIATES, INC. *v.* LONGARDNER & ASSOCIATES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 855 F. 2d 455.

No. 88–1014. BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION, COMMUNICATIONS INTERNATIONAL UNION *v.* CSX TRANSPORTATION, INC. C. A. 11th Cir. Certiorari denied. Reported below: 855 F. 2d 745.

No. 88–1015. CULLY *v.* GRACE HOSPITAL. C. A. 6th Cir. Certiorari denied. Reported below: 849 F. 2d 608.

No. 88–1016. CHAMBERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 831 F. 2d 302.

No. 88–1018. LITTLE ET AL. *v.* LESSLER. C. A. 1st Cir. Certiorari denied. Reported below: 857 F. 2d 866.

No. 88–1020. W. SCHLAFHORST & CO. ET AL. *v.* SCHUBERT & SALZER MASCHINENFABRIK AKTIENGESELLSCHAFT. C. A. Fed. Cir. Certiorari denied. Reported below: 856 F. 2d 202.

No. 88–1022. HENRICO COUNTY PUBLIC SCHOOLS ET AL. *v.* SPIELBERG, A MINOR BY HIS PARENTS, SPIELBERG ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 853 F. 2d 256.

No. 88–1023. UNITED STATES *v.* CHRISTEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 841 F. 2d 809.

No. 88–1024. PIERSON *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 208 Conn. 683, 546 A. 2d 268.

No. 88–1025. LARKINS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 852 F. 2d 189.

No. 88–1028. SCANLON *v.* SCHRINAR, COMMISSIONER OF PUBLIC LANDS OF WYOMING, ET AL. Sup. Ct. Wyo. Certiorari denied. Reported below: 759 P. 2d 1243.

No. 88–1030. BROWN *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 25 Ark. App. xvii.

No. 88–1032. JUTKOFSKY *v.* MAESTRI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 860 F. 2d 50.

No. 88–1033. NORFOLK & WESTERN RAILWAY CO. *v.* GARDNER ET AL. Sup. Ct. App. W. Va. Certiorari denied. Reported below: —— W. Va. ——, 372 S. E. 2d 786.

No. 88–1040. MANCINONE *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 15 Conn. App. 251, 545 A. 2d 1131.

No. 88–1041. HUNTZINGER *v.* MARSH, SECRETARY OF THE ARMY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 856 F. 2d 186.

No. 88–1045. WILLIAMS *v.* ATTORNEY GENERAL OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 88–1046. TORRES ET AL. *v.* WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 859 F. 2d 1523.

No. 88–1047. BECHTEL CONSTRUCTION, INC. *v.* LABORERS DISTRICT COUNCIL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 249.

No. 88–1050. APPLEGATE ET VIR *v.* CALIFORNIA ET AL.; and
No. 88–1054. CALIFORNIA *v.* FREEMAN. Sup. Ct. Cal. Certiorari denied. Reported below: 46 Cal. 3d 419, 758 P. 2d 1128.

No. 88–1051. JACKS *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 857 F. 2d 394.

No. 88–1057. NEC AMERICA, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 857 F. 2d 787.

No. 88–1058. TREEBY ET AL. *v.* GORMAN ET AL.; and
No. 88–1080. SWAGGART ET AL. *v.* ADLER, TRUSTEE IN BANKRUPTCY, ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 524 So. 2d 915.

No. 88–1060. POWERS *v.* BOARD OF COUNTY COMMISSIONERS OF KINGMAN COUNTY, KANSAS, ET AL. Ct. App. Kan. Certiorari denied. Reported below: 12 Kan. App. 2d lxii, 758 P. 2d 754.

No. 88–1061. HAMMOND *v.* AUBURN UNIVERSITY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 744.

No. 88–1065. PATTERSON *v.* ATLANTA BAR ASSN. ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: —— Ga. ——, 373 S. E. 2d 514.

No. 88–1073. SIERRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 860 F. 2d 1091.

No. 88–1077. ALCAN ALUMINIO DO BRASIL, S. A., ET AL. *v.* BENITEZ-ALLENDE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 857 F. 2d 26.

No. 88–1082. PATEL ET AL. *v.* MARYLAND CASUALTY CO. C. A. 7th Cir. Certiorari denied.

No. 88–1084. FISCHER *v.* BAR HARBOR BANKING & TRUST CO. C. A. 1st Cir. Certiorari denied. Reported below: 857 F. 2d 4.

No. 88–1086. ALBUQUERQUE A. R. T. CO. *v.* MIRAGE EDITIONS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 856 F. 2d 1341.

No. 88–1087. HENAO-OSPINA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1425.

No. 88–1090. TRESIZE ET UX. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 854 F. 2d 1324.

No. 88–1091. POWELL *v.* NIGRO ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88–1092. MARYLAND CASUALTY CO. *v.* LOZANO. C. A. 11th Cir. Certiorari denied. Reported below: 850 F. 2d 1470.

No. 88–1093. HILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 859 F. 2d 918.

No. 88–1096. ADAMS *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 26 Ark. App. 15, 758 S. W. 2d 709.

No. 88–1102. WESTMINSTER MANAGEMENT CORP. ET AL. *v.* MITCHELL, DIRECTOR OF FINANCE, CITY OF NEW ORLEANS, ET AL. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 525 So. 2d 1171.

No. 88–1104. PENNSYLVANIA *v.* GIANNINI ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 377 Pa. Super. 651, 541 A. 2d 1150.

No. 88–1106. AIELLO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 88–1107. BROWN *v.* CITY OF FORT LAUDERDALE ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–1110. HARDY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 855 F. 2d 753.

No. 88–1113. MIKULEC INDUSTRIES, INC. *v.* ICI AMERICAS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 856 F. 2d 181.

No. 88–1117. OSWALD *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1075.

No. 88–1118. LUTZ ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 153.

No. 88–1120. WILLIAMS ET UX. *v.* TUCSON UNIFIED SCHOOL DISTRICT NO. 1 OF PIMA COUNTY, ARIZONA, ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 158 Ariz. 32, 760 P. 2d 1081.

No. 88–1123. LANDERS SEED CO., INC. *v.* CHAMPAIGN NATIONAL BANK. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 165 Ill. App. 3d 1090, 519 N. E. 2d 957.

No. 88–1126. RYAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 2d 435.

No. 88–1127. UBEROI *v.* UNIVERSITY OF COLORADO ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–1133. OSTER *v.* NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 859 F. 2d 150.

No. 88–1141. DEMOCRATIC CENTRAL COMMITTEE OF THE DISTRICT OF COLUMBIA ET AL. *v.* D. C. TRANSIT SYSTEM, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 268 U. S. App. D. C. 406, 842 F. 2d 402.

No. 88–1152. INCOME PROPERTIES, INC., ET AL. *v.* LUNSFORD ET AL. Sup. Ct. Ga. Certiorari denied.

No. 88–1156. BLANCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 861 F. 2d 773.

No. 88–1158. PEREZ ET AL. *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied.

No. 88–1162. MOORE *v.* CITY OF RICHMOND ET AL. Sup. Ct. Va. Certiorari denied.

No. 88–1164. SPECTRON BROADCASTING CORP. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 273 U. S. App. D. C. 179, 858 F. 2d 774.

No. 88–1167. DANIEL CONSTRUCTION CO., A DIVISION OF DANIEL INTERNATIONAL CORP. *v.* LOCAL 257, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 856 F. 2d 1174.

No. 88–1171. GRAHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 858 F. 2d 986.

No. 88–1189. KETCHUM *v.* ADMINISTRATOR, ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 124 Ill. 2d 50, 528 N. E. 2d 689.

No. 88–5188. BENNETT *v.* CORROON & BLACK CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 845 F. 2d 104.

No. 88–5438. TERREBONNE *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 848 F. 2d 500.

No. 88–5573. CONN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 376 Pa. Super. 636, 541 A. 2d 789.

No. 88–5715. GATES *v.* VASQUEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–5754. RONNING *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 295 Ark. 228, 748 S. W. 2d 633.

No. 88–5802. HAWLEY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 595.

No. 88–5825. STOKES *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied.

No. 88–5857. HIGHFILL *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 146 Wis. 2d 867, 431 N. W. 2d 328.

No. 88–5858. KARLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 852 F. 2d 968.

No. 88–5869. BREWER *v.* UNITED STATES; and
No. 88–6129. FERGUSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 1319.

No. 88–5894. DAVIS *v.* GIBBONS, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 88–5895. CALDWELL *v.* MILLER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 857 F. 2d 1476.

No. 88–5897. DEL RAINE *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 857 F. 2d 1476.

No. 88–5900. HOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 857 F. 2d 1469.

No. 88–5913. DEL RAINE *v.* BANKS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 857 F. 2d 1476.

No. 88–5916. DAVIS *v.* BARBER, PAROLE OFFICER, INDIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 853 F. 2d 1418.

No. 88–5917. HOLMAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 168 Ill. App. 3d 172, 522 N. E. 2d 635.

No. 88–5922. DENSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 925.

No. 88–5925. TORRES-LOPEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 851 F. 2d 520.

No. 88–5926. VALDES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 925.

No. 88–5937. SANCHEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 859 F. 2d 483.

No. 88–5944. SUN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 926.

No. 88–5965. BEY *v.* ZIMMERMAN, ATTORNEY GENERAL OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1074.

No. 88–5971. GRAHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 756.

No. 88–5980. MIDDLETON *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1075.

No. 88–5993. FOREMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 845 F. 2d 1017.

No. 88–6000. MURPHY, AKA O'MURCHU *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 852 F. 2d 1.

No. 88–6021. MOLINA-URIBE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 853 F. 2d 1193.

No. 88–6022. MUSSER *v.* UNITED STATES; and
No. 88–6027. HARVEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 1484.

No. 88–6037. ZOLA *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 112 N. J. 384, 548 A. 2d 1022.

No. 88–6046. DURHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 850 F. 2d 692.

No. 88–6049. NIKOLAOU *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 854 F. 2d 1327.

No. 88–6050. MALIZIA *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 862 F. 2d 304.

No. 88–6052. MURR *v.* JACKSON, SUPERINTENDENT, PICKAWAY CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 1079.

No. 88–6054. TEAGLER *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 88–6055. STIVERS *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 848 F. 2d 1244.

No. 88–6057. SMITH *v.* OFFICE OF DISCIPLINARY COUNSEL. Sup. Ct. Pa. Certiorari denied.

No. 88–6058. SGARAGLINO *v.* STATE FARM FIRE & CASUALTY CO. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 862.

No. 88–6061. SMITH *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied. Reported below: 862 F. 2d 310.

No. 88–6065. MILLER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 170 Ill. App. 3d 1158, 542 N. E. 2d 185.

No. 88–6067. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 88–6068. FRIEL *v.* OWENS, COMMISSIONER, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–6071. MITCHELL *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 88–6077. MEZO *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 170 Ill. App. 3d 679, 525 N. E. 2d 134.

No. 88–6081. JONES *v.* CITY OF ST. LOUIS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1085.

No. 88–6085. WASHINGTON *v.* YLST, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–6087. LITTLETON *v.* ALEXANDER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 857 F. 2d 1474.

No. 88–6089. LEPISCOPO *v.* BLACKHURST, JUDGE, DISTRICT COURT OF NEW MEXICO, SECOND JUDICIAL DISTRICT. Sup. Ct. N. M. Certiorari denied.

No. 88–6091. POOL *v.* ARMONTROUT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 852 F. 2d 372.

No. 88–6095. CORTEZ *v.* PRICE ET AL. C. A. 5th Cir. Certiorari denied.

No. 88–6099. SHAYANFAR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 855 F. 2d 1492.

No. 88–6102. LEMONS *v.* COX ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 857 F. 2d 1471.

No. 88–6103. TRAVIS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 170 Ill. App. 3d 873, 525 N. E. 2d 1137.

No. 88–6106. LARKINS *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 152.

No. 88–6107. EIERLE *v.* ELLIS, SUPERINTENDENT, UNION CORRECTIONAL INSTITUTION, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 925.

No. 88–6109. WILSON *v.* TENOGLIA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 927.

No. 88–6110. WILSON *v.* SEITER, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 197.

No. 88–6111. WILSON *v.* DENTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 1081.

No. 88–6112. WILSON *v.* SEITER, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 1081.

No. 88–6114. DAVENPORT *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 88–6115. BALAWAJDER *v.* CRIMINAL DISTRICT COURT OF TEXAS AT FORT WORTH, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 88–6116. SCHULTZ ET UX. *v.* SWANHORST ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 855 F. 2d 859.

No. 88–6118. JANES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 863 F. 2d 885.

No. 88-6119. MOTEN *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 265.

No. 88-6123. CASTANEDA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 2d 435.

No. 88-6124. JONES *v.* ZIMMERMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88-6125. TROTZ *v.* SUPREME COURT OF THE UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 88-6130. MURRIETTA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 1090.

No. 88-6132. SEMENCHUK *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 153.

No. 88-6134. DAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 2d 318.

No. 88-6137. SWENSON *v.* MARSH, SECRETARY OF THE ARMY. C. A. D. C. Cir. Certiorari denied.

No. 88-6139. HARRIS *v.* WARDEN, MARYLAND HOUSE OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 802 F. 2d 451.

No. 88-6143. GRAY *v.* TEXAS. Ct. App. Tex., 6th Dist. Certiorari denied.

No. 88-6144. EVANS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 377 Pa. Super. 650, 541 A. 2d 1150.

No. 88-6145. MARTIN *v.* SHANK ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88-6146. DIAMOND *v.* DISCIPLINARY COUNSEL ET AL. Sup. Ct. Pa. Certiorari denied.

No. 88-6147. STOGNER *v.* PICKETT ET AL. C. A. 10th Cir. Certiorari denied.

No. 88-6149. CHILDS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 146 Wis. 2d 116, 430 N. W. 2d 353.

No. 88–6151. HAMILTON *v.* DISTRICT COURT OF MONTANA, THIRD JUDICIAL DISTRICT. Sup. Ct. Mont. Certiorari denied.

No. 88–6152. WILKINSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1425.

No. 88–6156. WOLFE *v.* ALEXANDRIA, VIRGINIA, ET AL.; and WOLFE *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–6157. YOUNG *v.* KRAATZ ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–6158. WALLS *v.* PROTHONOTARY, NEW CASTLE COUNTY. Sup. Ct. Del. Certiorari denied. Reported below: 549 A. 2d 699.

No. 88–6160. HUNT *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 150 Vt. 483, 555 A. 2d 369.

No. 88–6162. FICA *v.* SCHWARTZ. Sup. Ct. Fla. Certiorari denied. Reported below: 534 So. 2d 399.

No. 88–6163. ARONHALT, AKA JONJOCK *v.* DEEDS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 88–6164. HUANG *v.* STERN, ROSENAU & ROSENTHAL. Ct. App. D. C. Certiorari denied.

No. 88–6165. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 1089.

No. 88–6167. FERDIK *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 88–6168. KURBEGOVICH *v.* VASQUEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 154.

No. 88–6169. DEMOS *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 88–6170. SCHIEFELBEIN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 258 Ga. 623, 373 S. E. 2d 354.

No. 88-6171. TURNER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 88-6172. RAGHEB *v.* BLUE CROSS & BLUE SHIELD OF MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: 852 F. 2d 1288.

No. 88-6173. LEVY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1175.

No. 88-6174. ROTMAN *v.* WORCESTER HOUSING AUTHORITY. C. A. 1st Cir. Certiorari denied. Reported below: 867 F. 2d 606.

No. 88-6175. RYNKIEWICZ *v.* JEANES HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 862 F. 2d 310.

No. 88-6176. MAULDIN *v.* FIELDS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88-6178. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 198.

No. 88-6179. MCDEVITT *v.* BLUMENSTEIN. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1075.

No. 88-6182. ORTEGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 859 F. 2d 327.

No. 88-6183. EDWARDS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 203 Cal. App. 3d 1358, 248 Cal. Rptr. 53.

No. 88-6184. SLABY *v.* AMERICAN PHYSICAL SOCIETY ET AL. C. A. D. C. Cir. Certiorari denied.

No. 88-6185. HALL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88-6186. HERBAGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 850 F. 2d 1463.

No. 88-6191. BAKER *v.* MCMACKIN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 152.

No. 88-6192. JACKSON *v.* DUTTON, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 720.

No. 88–6194. BARNETTE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–6195. MOORE *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 1089.

No. 88–6196. HILLARY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 2d 315.

No. 88–6197. WILLIAMS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 548 So. 2d 501.

No. 88–6198. MORNES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88–6199. STEWART *v.* ST. PETERSBURG TIMES. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 2d 928.

No. 88–6200. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 169 Ill. App. 3d 1171, 540 N. E. 2d 581.

No. 88–6201. WHITE, BY HIS NEXT FRIEND SWAFFORD *v.* GERBITZ ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 661.

No. 88–6205. DARROW *v.* DAVIS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 199.

No. 88–6206. MAULICK *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 856 F. 2d 187.

No. 88–6208. HARVEY *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 88–6209. GRIFFIN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 167 Ill. App. 3d 1165, 538 N. E. 2d 919.

No. 88–6210. BOX *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC (AND CLASSIFICATION CENTER) AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1074.

No. 88–6213. BOTSCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 2d 315.

No. 88-6214. FISHER *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 863 F. 2d 45.

No. 88-6215. SOSA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 1280.

No. 88-6217. DUNCAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 855 F. 2d 1528.

No. 88-6218. ARIAS GOMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 858 F. 2d 1387.

No. 88-6219. WALKER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 860 F. 2d 1010.

No. 88-6220. BOWER *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 88-6221. GREGORY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 371 Pa. Super. 551, 538 A. 2d 578.

No. 88-6223. HANNAFORD *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 167 Mich. App. 147, 421 N. W. 2d 608.

No. 88-6225. JARAMILLO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88-6226. LAWRENCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 859 F. 2d 919.

No. 88-6228. MALEKZADEH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 855 F. 2d 1492.

No. 88-6229. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 858 F. 2d 416.

No. 88-6230. PEROTTI *v.* SHANER. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 195.

No. 88-6231. MILLER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 88-6232. OUTLAW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 922.

No. 88-6233. SCOTT *v.* DANTES, CHAIRMAN, MARYLAND PAROLE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 265.

No. 88-6235. GILES *v.* GARWOOD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 853 F. 2d 876.

No. 88-6238. FELDMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 853 F. 2d 648.

No. 88-6239. WILSON *v.* DENTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 1081.

No. 88-6240. SPAN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 88-6241. NEAL *v.* IAM LOCAL LODGE 2386. C. A. 5th Cir. Certiorari denied. Reported below: 856 F. 2d 189.

No. 88-6244. KELLY *v.* MCWHERTER, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 88-6246. DUPREE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 2d 871.

No. 88-6247. HERMAN *v.* GEER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 847 F. 2d 838.

No. 88-6248. HELWIG *v.* LECUREAUX, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 1079.

No. 88-6249. LOWE *v.* KING ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 2d 436.

No. 88-6250. CHURCH *v.* WARREN, JUDGE, CIRCUIT COURT OF VIRGINIA, AMELIA COUNTY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 263.

No. 88-6251. HUNTER *v.* LEWIS ET AL. C. A. 11th Cir. Certiorari denied.

No. 88-6252. AINSWORTH *v.* ROBERTS, SUPERINTENDENT, RANKIN COUNTY CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 88-6253. ALLEN *v.* HARRIS ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 755 S. W. 2d 393.

No. 88-6254. NOBLE *v.* REES, SUPERINTENDENT, DEUEL VOCATIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 862.

No. 88-6256. MCSWAIN *v.* BEYER, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88-6257. PEARSALL *v.* DISTRICT OF COLUMBIA DEPARTMENT OF HUMAN SERVICES. Ct. App. D. C. Certiorari denied.

No. 88-6259. WHITESIDE *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1085.

No. 88-6261. NUTTELMAN *v.* JULCH ET AL. Sup. Ct. Neb. Certiorari denied. Reported below: 228 Neb. 750, 424 N. W. 2d 333.

No. 88-6262. PAREZ *v.* GENERAL ATOMIC. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 572.

No. 88-6266. OLIVE *v.* SEARS, ROEBUCK & CO. C. A. 6th Cir. Certiorari denied. Reported below: 849 F. 2d 609.

No. 88-6276. MANN *v.* BURKE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 855 F. 2d 862.

No. 88-6278. STRICKLAND *v.* TILLMAN, CHIEF JUDGE, DEKALB COUNTY SUPERIOR COURT, ET AL. C. A. 11th Cir. Certiorari denied.

No. 88-6279. MORRISON *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE FIRST JUDICIAL DEPARTMENT. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 137 App. Div. 2d 70, 527 N. Y. S. 2d 792.

No. 88-6280. GARCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1424.

No. 88-6284. WINTERS *v.* LYNCH ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 197.

No. 88-6291. ADESIJI *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 854 F. 2d 299.

No. 88-6302. HENRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 889.

No. 88-6303. HANDAL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 743.

No. 88-6304. BUELOW ET AL. *v.* BABLITCH, ADMINISTRATOR, WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 847 F. 2d 420.

No. 88-6312. TAUBER *v.* BROWN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 152.

No. 88-6314. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 2d 748.

No. 88-6322. MCNAIR *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88-6323. GARDNER *v.* BORGERT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 857 F. 2d 1474.

No. 88-6332. TORRES-BENAVIDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 2d 875.

No. 88-6339. BISBICUS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 868 F. 2d 1267.

No. 88-6344. KENNEDY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 1269.

No. 88-6351. LOWENBERG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 853 F. 2d 295.

No. 88-6355. QUINONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 862 F. 2d 17.

No. 88-6357. PROVENCIO-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 1278.

No. 88-6364. STRIFLER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 851 F. 2d 1197.

No. 88-399. HAMMOND *v.* TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS. C. A. 7th Cir. Certiorari denied. JUSTICE

BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 848 F. 2d 95.

No. 88–651. RICHARD ANDERSON PHOTOGRAPHY *v.* RADFORD UNIVERSITY ET AL. C. A. 4th Cir. Motions of American Intellectual Property Law Association and Association of American Publishers, Inc., et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 852 F. 2d 114.

No. 88–776. RAFF, ARKANSAS STATE PROSECUTOR, ET AL. *v.* LEWELLEN. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 843 F. 2d 1103.

No. 88–777. GUANGZHOU MARITIME TRANSPORT BUREAU OF CHINA *v.* HUGHES DRILLING FLUIDS. C. A. 5th Cir. Motion of Maritime Law Association of the United States for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 852 F. 2d 840.

No. 88–813. CINCINNATI POST ET AL. *v.* GENERAL ELECTRIC CO. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 854 F. 2d 900.

No. 88–850. BLINDER, ROBINSON & CO., INC., ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 10th Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 855 F. 2d 677.

No. 88–920. DIXON, WARDEN, ET AL. *v.* MCDOWELL. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 858 F. 2d 945.

No. 88–1026. ARMONTROUT, WARDEN *v.* POOL. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 852 F. 2d 372.

No. 88–1043. ZANT, WARDEN *v.* CERVI. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 855 F. 2d 702.

No. 88–950. PAGE *v.* E. I. DU PONT DE NEMOURS & CO. C. A. 4th Cir. Certiorari denied. JUSTICE O'CONNOR took no

part in the consideration or decision of this petition. Reported below: 857 F. 2d 1469.

No. 88–975. DUDLEY *v.* STUBBS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 849 F. 2d 83.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

Because the judgment below rests upon a fundamental misconception of this Court's decision in *Whitley* v. *Albers*, 475 U. S. 312 (1986), and conflicts with the approach taken by the vast majority of the Courts of Appeals, including a prior decision of the Second Circuit itself, I would grant the petition for certiorari. Under the decision which the Court declines to review today, prison officials are essentially held strictly liable under the Eighth Amendment for split-second decisions made in the face of serious threats to the security of the prison facility. This is precisely the result that our decision in *Whitley* was designed to avoid.

I

On February 4, 1977, the Arthur Kill Correctional Facility was the site of an institution-wide sitdown strike orchestrated and controlled by a group of prisoners known as the "Muslims." That evening, as respondent, John Stubbs, an inmate at the institution, was walking down the main corridor of C control area of the prison to make a telephone call, he was confronted by a gang of 20 to 30 Muslim prisoners. The gang was armed with homemade knives up to 16 inches in length as well as other weapons wrapped in sheets. The mob began to chase respondent through the corridors of the prison, throwing garbage cans and table legs down the hallways. As respondent ran toward the telephone room, he noticed petitioner, Robert Dudley, and another guard standing in front of a door leading to the administrative control center of the prison. Neither Officer Dudley nor the correctional officer with him had a firearm, a baton, or a two-way radio. The prison arsenal, the offices of the prison superintendent, and the prison hospital are all accessible from the administration corridor.

When respondent approached the door to the administration area with the armed mob directly behind him, Officer Dudley and the other corrections officer entered the administration corridor and secured the door from the other side. Officer Dudley refused

to open the door to the administration corridor, despite the entreaties of respondent. Respondent then ran down another corridor and jumped over the counter of the telephone room and cried for help. The correctional officers in the telephone room, and one inmate present there, immediately removed themselves to positions of safety. At this point the angry mob caught up with respondent and beat him severely.

Respondent brought this action under 42 U. S. C. § 1983 against petitioner and other corrections officials, alleging that the failure to aid him during the disturbance constituted a violation of his Eighth Amendment rights. The case was tried to a jury before a Magistrate. Officer Dudley testified that he did not open the administration door because he never had the chance to, but indicated that he would not have done so in any event, given the fact that the prison arsenal and the superintendent's office lay on the other side. As he put it at trial, "[T]here is no way you are to allow inmates to go up into that area, especially in that type of situation." Pet. for Cert. 5. In addition, there was expert testimony at trial that Officer Dudley had followed proper procedure in securing the administration corridor door. At the close of the evidence, petitioner asked for an instruction to the jury that his conduct must have been "malicious and sadistic" to support Eighth Amendment liability under this Court's decision in *Whitley* v. *Albers*, *supra*. The trial court rejected petitioner's proposed instruction and instead delivered a "deliberate indifference" charge. The jury returned a verdict against Officer Dudley in the amount of $26,000 for alleged violations of respondent's Eighth Amendment rights.

The Magistrate subsequently granted petitioner's motion for a judgment notwithstanding the verdict. The Magistrate found this case "akin" to the situation presented in *Whitley*, and emphasized that "'prison administrators . . . should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" App. to Pet. for Cert. 5b, quoting *Whitley*, *supra*, at 321–322 (citation omitted). The Magistrate cited three factors which justified the entry of judgment for petitioner. First, "there was a serious threat to prison security at the time Stubbs sought Dudley's protection." App. to Pet. for Cert. 7b. Second, "Dudley acted without ill will or malice"; and third, "prior to the attack upon

Stubbs, Dudley had no knowledge of either a threat to Stubbs' life, or the possibility that Stubbs would be attacked." *Ibid.* The Magistrate concluded that, "[g]iven the exigent circumstances, it is obvious that Dudley acted quickly to respond to the dangerous situation with which he was confronted. His failure to take into account Stubbs' welfare may have been unfortunate but it cannot fairly be characterized as deliberately indifferent." *Id.*, at 9b.

The Court of Appeals for the Second Circuit reversed the judgment for petitioner and reinstated the jury's verdict. 849 F. 2d 83 (1988). The crux of the lower court's holding in this case is contained in the following passage:

> "*Whitley* involved a full-blown prison riot. In the present case the condition creating the 'prison disturbance' was the Stubbs incident itself: twenty or more angry prisoners wanted to hurt one prisoner. The issue put to the jury was whether the defendant corrections officers acted unconstitutionally in allowing them to do so. The only 'competing institutional concern[ ]' in this context was whether the defendants, by aiding Stubbs, might plausibly put prison security (or their own safety) at risk. This was for the jury to decide under the 'deliberate indifference' standard." *Id.*, at 86 (footnote omitted).

The Court of Appeals noted that there was evidence that the prison's Muslim population had engaged in a "sit down strike" on the day of the incident, but found that "the situation apparently created no unusual threat to prison security." *Id.*, at 86, n. 3.

In *Whitley* this Court analyzed the dictates of the Eighth Amendment in the context of a prison disturbance that involved the taking of a correctional officer as a hostage. In response to the hostage taking, prison officials determined that forceful intervention was necessary to protect the life of the hostage and the safety of the prisoners not connected with the riot. During the assault on a barricade erected by the prisoners holding the hostage, a prisoner was hit in the knee by a shotgun blast. The prisoner brought a § 1983 action against prison officials, claiming violation of his Eighth Amendment rights. The District Court directed a verdict for the prison officials, finding that the use of deadly force was justified "'under the unique circumstances of this case.'" 475 U. S., at 317. The Court of Appeals reversed, find-

ing that because the prison riot was subsiding at the time the rescue plan was carried out, a reasonable jury could find that the use of force entailed a "'"deliberate indifference"'" to the injured prisoner's Eighth Amendment rights. *Id.*, at 318.

This Court reversed, noting that the "deliberate indifference" standard of *Estelle* v. *Gamble*, 429 U. S. 97 (1976), "was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." *Whitley*, 475 U. S., at 320. The Court found that the balance must be struck differently where prison security and the safety of both prison officials and inmates is threatened. "In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." *Ibid.* Accordingly, the Court set out the following test to be applied in such cases:

> "Where a prison security measure is undertaken to resolve a disturbance, such as occurred in this case, that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" *Id.*, at 320–321 (citation omitted).

The Court indicated that the standard it enunciated applied to "prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline." *Id.*, at 322. Decisions made "in bad faith or for no legitimate purpose" are not insulated from review, but judge and jury may not substitute their judgment as to the reasonableness of the action taken by prison officials. Unless an inference of wanton and sadistic infliction of pain arises from the facts as pled, "the case should not go to the jury." *Ibid.*

The Court of Appeals' determination that "deliberate indifference" was the correct Eighth Amendment standard under which to assess the correctional officer's action in this case is directly contrary to our decision in *Whitley*. The court's opinion acknowl-

edges that the very kind of "competing institutional concerns" present in *Whitley* were present here, but then goes on to find that the deliberate indifference standard was appropriate. The situation here was arguably *more* dangerous than in *Whitley*, where, although a hostage had been taken, the situation had stabilized and the correction officials had time to plan a course of action. Here a split-second decision had to be made. A single door stood between armed prisoners, who had engaged in a sit-in earlier in the day, and the prison arsenal and the office of the prison superintendent. Application of the deliberate indifference standard in a setting like this one essentially renders prison officials strictly liable for putting the security of the prison and the lives of *all* its inhabitants before the physical security of one inmate. In this case, if Officer Dudley had attempted to aid respondent by opening the door, and tragedy had ensued, he would no doubt have been subject to disciplinary action by his superiors, not to mention state law tort liability for any ensuing injuries caused by his decision.

The judgment here also conflicts with the decision of another panel of the Second Circuit which held that the *Whitley* standard applied to a correctional officer's use of force in the face of an explosive situation created by a prisoner's use of racial slurs in a crowded cafeteria and his subsequent resistance to orders to leave the scene. See *Corselli* v. *Coughlin*, 842 F. 2d 23, 26 (1988) ("*Whitley* is distinguishable on the facts, since that case involved a full-scale prison riot and the incident here was far from that. Nevertheless, the test under *Whitley* applies . . ."). Moreover, no other Court of Appeals has interpreted *Whitley* as limited to "full-blown prison riots," and it is clear that this case would have been decided differently in other Circuits in the country. See, *e. g.*, *Hines* v. *Boothe*, 841 F. 2d 623, 625 (CA5 1988) (applying *Whitley* where single prisoner resisted order to return to his cell); *Holloway* v. *Lockhart*, 813 F. 2d 874, 879 (CA8 1987) (applying *Whitley* standard to use of tear gas to end occupation of prison day room); *Ort* v. *White*, 813 F. 2d 318, 323 (CA11 1987) ("Although *Whitley* was decided in the the extremely volatile context of a prison riot, its reasoning may be applied to other prison situations requiring immediate coercive action").

II

While the resources of this Court are scarce, and the judgment the Court declines to review today is aberrational enough that correction within the Second Circuit appears likely, in my view the great potential for disruption of prison security engendered by the judgment of the Court of Appeals in this case merits the strong medicine of summary reversal. There are 64 state run correctional institutions within the jurisdiction of the Second Circuit with a total prison population of over 40,000 inmates. U. S. Dept. of Justice, Sourcebook of Criminal Justice Statistics—1987, pp. 449, 493 (1988). The Federal Government runs five correctional institutions within the same geographic region, housing almost 4,000 federal detainees. U. S. Dept. of Justice, Federal Prison System, Monday Morning Highlights, Jan. 23, 1989. In all of these institutions, prison officials and correctional officers must now choose between their sworn duty to maintain the security of the institution and the dictates of the Eighth Amendment as interpreted by the Second Circuit. Because nothing in the Constitution creates such a Hobson's choice, and because this Court has explicitly so held in *Whitley*, I would grant the petition for certiorari and reverse the judgment below. I respectfully dissent.

No. 88–998. CALDWELL *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this motion and this petition. Reported below: 859 F. 2d 805.

No. 88–1008. ALMAN *v.* GEORGE MANUFACTURING CORP. ET AL. C. A. 1st Cir. Motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief as *amicus curiae* granted. Certiorari denied.

No. 88–1062. BEER WHOLESALERS, INC. *v.* MILLER BREWING CO. ET AL. Ct. App. Minn. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 426 N. W. 2d 438.

No. 88–1089. BENSON *v.* FAUL ET AL; IN RE BENSON; and BENSON *v.* ALLY ET AL. C. A. 5th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied.

No. 88–1112. HONOLULU FEDERAL SAVINGS & LOAN ASSN. *v.* MURABAYASHI ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 848 F. 2d 1243.

No. 88–5586. BURTON *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–5871. SLOAN *v.* MISSOURI. Sup. Ct. Mo.;
No. 88–6079. JONES *v.* ILLINOIS. Sup. Ct. Ill.;
No. 88–6082. HARDY *v.* GEORGIA. Sup. Ct. Ga.;
No. 88–6101. TURNER *v.* FLORIDA. Sup. Ct. Fla.;
No. 88–6135. BOLIEK *v.* MISSOURI. Ct. App. Mo., Southern Dist.;
No. 88–6136. HARVEY *v.* FLORIDA. Sup. Ct. Fla.;
No. 88–6166. ALLRIDGE *v.* TEXAS. Ct. Crim. App. Tex.;
No. 88–6190. WILLIAMS *v.* OHIO. Sup. Ct. Ohio;
No. 88–6202. HAMILTON *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–6290. GILMORE *v.* MISSOURI. Ct. App. Mo., Eastern Dist.; and
No. 88–6325. BROWN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: No. 88–5871, 756 S. W. 2d 503; No. 88–6079, 123 Ill. 2d 387, 528 N. E. 2d 648; No. 88–6082, 258 Ga. 523, 371 S. E. 2d 849; No. 88–6101, 530 So. 2d 45; No. 88–6135, 755 S. W. 2d 417; No. 88–6136, 529 So. 2d 1083; No. 88–6166, 762 S. W. 2d 146; No. 88–6190, 38 Ohio St. 3d 346, 528 N. E. 2d 910; No. 88–6202, 46 Cal. 3d 123, 756 P. 2d 1348; No. 88–6290, 755 S. W. 2d 419; No. 88–6325, 38 Ohio St. 3d 305, 528 N. E. 2d 523.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–5892. IN RE S. Sup. Ct. Mo. Motion of petitioner to seal the appendix to the petition for writ of certiorari granted. Certiorari denied.

No. 88–6009. CRAWFORD *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 257 Ga. 681, 362 S. E. 2d 201.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

JUSTICE MARSHALL, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari and vacate the death sentence in this case. Even if I did not take this view, I would grant the petition to resolve the question whether Georgia's standard for change of venue—forbidding changes in venue unless prejudice renders a fair trial impossible—comports with the requirements of due process.

Eddie Crawford was convicted of murder and sentenced to death. The Supreme Court of Georgia reversed on the grounds that the jury might actually have convicted Crawford not of murder but felony murder, a crime not charged in the indictment. On retrial, Crawford's attorney filed a motion for change of venue, which was denied. He also objected to the seating of any juror who had knowledge of the prior proceeding. This motion was also denied. According to the petition in this case, of the 90 venirepersons, 57 indicated that they were aware of the prior proceedings, 50 indicated that they knew that Crawford had been convicted, and 32 knew that the first jury had sentenced him to death. The jury that was finally empaneled contained eight persons who knew about the prior trial, five who knew that Crawford had been convicted, and three who knew that he had been sentenced to death. The jury convicted Crawford of murder and sentenced him to death.

On appeal, Crawford challenged, *inter alia*, the trial court's refusal to grant him a change of venue. The Supreme Court of Georgia rejected this claim, holding that the setting of the trial was not "'inherently prejudicial as a result of the pretrial publicity.'" 257 Ga. 681, 683, 362 S. E. 2d 201, 203 (1987) (quoting *Chancey* v. *State*, 256 Ga. 415, 431, 349 S. E. 2d 717, 732 (1986)). The court concluded that the jury selection did not show "actual

prejudice to a degree that rendered a fair trial impossible." 257 Ga., at 683, 362 S. E. 2d, at 203.

In my view, Georgia's standard for change of venue is so hard to satisfy that it violates any conceivable notion of due process. It totally ignores this Court's repeated recognition that "our system of law has always endeavored to prevent *even the probability* of unfairness." *In re Murchison*, 349 U. S. 133, 136 (1955) (emphasis added); see also *Sheppard* v. *Maxwell*, 384 U. S. 333, 352 (1966); *Estes* v. *Texas*, 381 U. S. 532, 544 (1965). As I argued recently in *Brecheen* v. *Oklahoma*, 485 U. S. 909, 911 (1988) (opinion dissenting from denial of certiorari), a State's change of venue standard must reflect that a "defendant's interest in a fundamentally fair trial outweighs the State's interest in holding that trial in a particular district." That standard has been flagrantly violated in this case by the seating of a jury a majority of which knew of Crawford's past trial and a quarter of which knew of his prior death sentence.

In the absence of guidance from this Court, the States continue to take divergent paths. It is time we addressed the minimal due process requirements for state change of venue standards. See, *e. g.*, *Lee* v. *Georgia*, 488 U. S. 879 (1988) (MARSHALL, J., dissenting from denial of certiorari); *Hale* v. *Oklahoma*, 488 U. S. 878 (1988) (MARSHALL, J., dissenting from denial of certiorari). I would grant the petition.

No. 88-6059. DEPEW *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 38 Ohio St. 3d 275, 528 N. E. 2d 542.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not hold these views, I would still grant the petition for certiorari. By any reasonable measure, the prosecutor's comments to the jury "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden* v. *Wainwright*, 477 U. S. 168, 181 (1986), quoting *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 643 (1974).

Petitioner was convicted of aggravated murder and sentenced to death. The Ohio Supreme Court identified four instances of prosecutorial misconduct, but concluded that, because of the brutal nature of the crime, they neither singly nor cumulatively deprived petitioner of a fair trial.

The first was the prosecution's inquiry, during cross-examination of a defense witness, into a "knife fight" during which petitioner had allegedly been cut. The knife fight was wholly unrelated to the alleged murder, and the judge accordingly admonished the jury to disregard the prosecutor's reference to it. 38 Ohio St. 3d 275, 284, 528 N. E. 2d 542, 553 (1988).

The second was the prosecutor's comment during closing argument that, if petitioner had taken the stand, the prosecutor would have inquired into petitioner's criminal convictions *after* the date of the alleged murder. The judge again ordered that the jury disregard the prosecutor's comment, and the prosecutor apologized to the jury, saying: "'I shouldn't have said that. I wish you would just forget that because there's nothing like that here.'" *Ibid.*

The third was the prosecutor's introduction into evidence, during the penalty phase, of a photograph of petitioner standing next to a marijuana plant. The prosecutor adverted to this photograph during the penalty phase. The State Supreme Court found the introduction of this photograph to be error, but concluded: "The factors supporting death as a penalty were so persuasive and so numerous that this single photograph cannot be regarded as having materially prejudiced [petitioner]." *Id.*, at 287, 528 N. E. 2d, at 555.

Fourth and finally, the prosecutor made various improper closing-argument comments, "by reminding the jury that any sentence less than death could result in eventual parole, by alluding to facts not in evidence, by asking the jury why [petitioner] did not call certain persons to the stand, and by appealing to the jury's desire for law and order." *Ibid.* The State Supreme Court again found these comments only harmless error.

In my view, it is beyond serious dispute that these prosecutorial actions cumulatively deprived petitioner of a fair trial. The dissenting State Supreme Court judge characterized these actions, quite properly in my view, as "prosecutorial misconduct of the worst sort." *Id.*, at 293, 528 N. E. 2d, at 560 (Wright, J., concurring in part and dissenting in part). Even the majority, so

tolerant of these abuses, found it necessary to state: "While the prosecutorial misconduct in this case does not require a reversal of appellant's sentence, we express our mounting alarm over the increasing incidence of misconduct by both prosecutors and defense counsel in capital cases." *Id.*, at 288, 528 N. E. 2d, at 556. I would accordingly grant certiorari here to clarify that behavior such as that outlined above is simply not constitutionally acceptable and to correct the errors in this case which may have been responsible for putting petitioner on death row.

No. 88–6078. BRITZ *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 123 Ill. 2d 446, 528 N. E. 2d 703.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari and vacate the death sentence in this case. Even if I did not hold this view, I would grant the petition to consider whether a jury instruction that sympathy should not influence a decision regarding the imposition of the death penalty violates the Eighth and Fourteenth Amendments.

I

Dewayne C. Britz was convicted of murder, aggravated kidnaping, aggravated criminal sexual assault, armed robbery, and concealment of a homicidal death. At the penalty phase, the trial judge charged the jury that "'[n]either sympathy nor prejudice should influence you.'" 123 Ill. 2d 446, 479, 528 N. E. 2d 703, 719 (1988), quoting Illinois Pattern Jury Instructions, Criminal, No. 1.01 (2d ed. 1981). Defense counsel specifically objected to this instruction. The jury unanimously found that statutory aggravating factors existed and that no mitigating factors precluded the imposition of the death sentence. Petitioner was sentenced to death.

The Illinois Supreme Court affirmed. 123 Ill. 2d 446, 528 N. E. 2d 703 (1988). The court held that the trial court's no-sympathy jury instruction was similar to the instruction approved in *California* v. *Brown*, 479 U. S. 538 (1987). Relying on its decision in *People* v. *Stewart*, 104 Ill. 2d 463, 473 N. E. 2d 1227 (1984), cert.

denied, 471 U. S. 1120 (1985), the court further held that the instruction did not deny petitioner a fair trial because the jury was also instructed that it could consider any other facts or circumstances that favored imposition of a sentence other than death, and because the defendant was permitted to introduce all evidence he considered mitigating, including evidence ruled inadmissible during the guilt phase.

II

We have recognized repeatedly that, in a capital case, the sentencer must not be precluded from considering any mitigating evidence relating to the defendant or the crime. See, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104, 111–112 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). Mitigating evidence is allowed at the penalty phase so the sentencer may consider "compassionate . . . factors stemming from the diverse frailties of humankind." *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (plurality opinion). "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Gregg* v. *Georgia*, *supra*, at 199 (joint opinion of Stewart, Powell, and STEVENS, JJ.); see also *Caldwell* v. *Mississippi*, 472 U. S. 320, 330–331 (1985).

The Court reaffirmed the importance of considering mitigating evidence in *California* v. *Brown*, *supra*. There, the trial judge instructed the jury that it must not be swayed by "'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.'" 479 U. S., at 542. The majority held that this instruction did not violate the Eighth and Fourteenth Amendments for two reasons. First, it found that the word "mere" informed the jury "to ignore *only* the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." *Ibid.* (emphasis added). "By concentrating on the noun 'sympathy,'" the defendant had "ignore[d] the crucial fact that the jury was instructed to avoid basing its decision on *mere* sympathy." *Ibid.* (emphasis in original). Second, the majority deemed it "highly unlikely that any reasonable juror would almost perversely single out the word 'sympathy' from the other nouns which accompany it in the instruction: conjecture, passion, prejudice, public opinion, or public feeling." *Id.*, at 542–543. "Reading the instruction as a whole," *id.*, at 543, a rational juror could only conclude that the instruction was intended simply to confine

the jury's deliberations to considerations arising from the evidence presented.

Neither of the reasons relied upon by the majority to uphold the instruction in *California* v. *Brown*, *supra*, is applicable to the jury instruction at issue in this case. Here, the jury was informed that sympathy should not influence its decision *under any circumstances*. The trial court's all-inclusive no-sympathy instruction, thus, embraced sympathy engendered by facts in the record as well as sympathy engendered by "extraneous emotional factors." *Ibid.* Furthermore, unlike the instruction in *Brown*, the instruction here was not contained in "a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty." *Ibid.* Reasonable jurors, therefore, may well have thought they were not permitted to exercise mercy or compassion when sentencing petitioner, even if such feelings were "rooted" in the evidence. *Id.*, at 542.

III

The constitutionality of a general no-sympathy instruction is a recurring issue on which the lower courts have differed. Compare *Byrne* v. *Butler*, 847 F. 2d 1135 (CA5 1988), and *State* v. *Clemmons*, 753 S. W. 2d 901 (Mo.) (en banc), cert. denied, 488 U. S. 948 (1988), with *People* v. *Hamilton*, 46 Cal. 3d 123, 152, and n. 7, 756 P. 2d 1348, 1364–1365, and n. 7 (1988), cert. denied, *ante*, p. 1040, and *Parks* v. *Brown*, 860 F. 2d 1545, 1559 (CA10 1988). The petition should be granted in order to resolve this conflict and to address this important issue. I dissent.

No. 88–6113. COBB *v.* NIZAMI ET AL. C. A. 4th Cir. Motion of NAACP Legal Defense and Educational Fund for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 851 F. 2d 730.

No. 88–6133 (A–532). TROTZ *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. Certiorari denied.

No. 88–6281. LAYTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KENNEDY took no part in the consideration or decision of this petition. Reported below: 855 F. 2d 1388.

Rehearing Denied

No. 87-2009. GREENMAN *v.* UNITED STATES, 488 U. S. 824;

No. 88-237. NOEL *v.* DEPARTMENT OF SANITATION OF CITY OF NEW YORK, 488 U. S. 925;

No. 88-459. ANDERSON ET AL. *v.* UNITED STATES, 488 U. S. 966;

No. 88-736. WANKOFF, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF WANKOFF *v.* TIBBS ET AL., 488 U. S. 1007;

No. 88-751. ROWLAND *v.* ALAMEDA COUNTY PROBATION DEPARTMENT, 488 U. S. 982;

No. 88-896. POLYAK *v.* HULEN ET AL., 488 U. S. 999;

No. 88-5603. INGRAM *v.* KEMP, WARDEN, 488 U. S. 975;

No. 88-5701. SPAN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 488 U. S. 973;

No. 88-5716. LEMBERG *v.* TSENG ET AL., 488 U. S. 984;

No. 88-5768. SELLNER *v.* PRINCE GEORGE'S COUNTY, MARYLAND, ET AL., 488 U. S. 985;

No. 88-5852. BETKA *v.* CITY OF WEST LINN, OREGON, ET AL. (two cases), 488 U. S. 999;

No. 88-5860. TROTZ *v.* UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF PENNSYLVANIA, ET AL., 488 U. S. 1015;

No. 88-5880. SINGLETON *v.* THIGPEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, 488 U. S. 1019; and

No. 88-5982. IN RE GILL, 488 U. S. 1002. Petitions for rehearing denied.

No. 87-7311. POINDEXTER *v.* OHIO, 488 U. S. 916. Motion for leave to file petition for rehearing denied.

No. 88-575. BURT *v.* MAUI ARCHITECTURAL GROUP, INC., ET AL., 488 U. S. 962. Motion of appellant to consolidate denied. Petition for rehearing denied.

No. 88-647. WHITEHORN ET UX. *v.* MURPHY ET AL., 488 U. S. 997. Petition for rehearing denied. JUSTICE BRENNAN and JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 88-656. FRIEDMAN *v.* FERGUSON ET AL., 488 U. S. 993;

No. 88-677. BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS AND ESTATE OF BOYLE *v.* UNITED TECHNOLOGIES CORP., 488 U. S. 994; and

No. 88–5921. IN RE MARTIN, 488 U. S. 1002. Petitions for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of these petitions.

FEBRUARY 24, 1989

Miscellaneous Orders

No. A–638 (88–6585). FETTERLY *v.* IDAHO. Sup. Ct. Idaho. Application to continue stay of execution of death warrant, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. A–671 (88–6635). WILLIAMS *v.* KEMP, WARDEN. C. A. 11th Cir. Application of respondent for an order to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

FEBRUARY 27, 1989

Dismissal Under Rule 53

No. 88–1017. AJAX NAVIGATION CORP. *v.* DOS SANTOS. Dist. Ct. App. Fla., 3d Dist. Certiorari dismissed under this Court's Rule 53. Reported below: 531 So. 2d 231.

Appeals Dismissed

No. 88–715. BURLESON *v.* BURLESON. Appeal from Ct. App. Cal., 3d App. Dist., dismissed for want of substantial federal question.

No. 88–5990. ROBINSON *v.* UNITED STATES DEPARTMENT OF EDUCATION. Appeal from D. C. E. D. Pa. dismissed for want of jurisdiction.

No. 88–6242. ROBINSON *v.* ENGLISH DEPARTMENT OF THE UNIVERSITY OF PENNSYLVANIA ET AL. Appeal from D. C. E. D. Pa. dismissed for want of jurisdiction.

Certiorari Granted—Vacated and Remanded

No. 87–1784. MASSACHUSETTS *v.* GRAY, TRUSTEE IN BANKRUPTCY OF NEWBURY CAFE, INC., DBA 29 NEWBURY. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Ron Pair Enterprises, Inc.*, *ante*, p. 235. Reported below: 841 F. 2d 20.

No. 87–2070. DEGEARE ET AL. *v.* SLATTERY GROUP, INC., ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Firestone Tire & Rubber Co.* v. *Bruch*, *ante*, p. 101. Reported below: 837 F. 2d 812.

No. 87–6063. MEADOWS *v.* HOLLAND, WARDEN. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harris* v. *Reed*, *ante*, p. 255. Reported below: 831 F. 2d 493.

No. 87–7320. SPARKS *v.* FOLTZ, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Harris* v. *Reed*, *ante*, p. 255. Reported below: 848 F. 2d 194.

No. 88–163. COMBUSTION ENGINEERING, INC., ET AL. *v.* SAPORITO ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Firestone Tire & Rubber Co.* v. *Bruch*, *ante*, p. 101. Reported below: 843 F. 2d 666.

No. 88–729. ROWE ET AL. *v.* ALLIED CHEMICAL HOURLY EMPLOYEES' PENSION PLAN ET AL. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Firestone Tire & Rubber Co.* v. *Bruch*, *ante*, p. 101. Reported below: 852 F. 2d 569.

Miscellaneous Orders

No. D–723. IN RE DISBARMENT OF STARK. Disbarment entered. [For earlier order herein, see 487 U. S. 1248.]

No. D–735. IN RE DISBARMENT OF STOLL. Disbarment entered. [For earlier order herein, see 488 U. S. 885.]

No. D–771. IN RE DISBARMENT OF BIAGGI. It is ordered that Mario Biaggi, of New York, N. Y., be suspended from the prac-

tice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 114, Orig. LOUISIANA *v.* MISSISSIPPI ET AL., 488 U. S. 990. Petition for rehearing and alternative motion to file separate complaint denied.

No. 87–2127. AMERICAN FOREIGN SERVICE ASSN. ET AL. *v.* GARFINKEL, DIRECTOR, INFORMATION SECURITY OVERSIGHT OFFICE, ET AL. D. C. D. C. [Probable jurisdiction noted, 488 U. S. 923.] Motions of United States Senate and Speaker and Leadership Group for leave to file briefs as *amici curiae* out of time granted.

No. 88–148. SOUTHERN NATURAL GAS CO. *v.* FRITZ ET AL. Sup. Ct. Miss. Motion of petitioner to defer consideration of the petition for writ of certiorari granted.

No. 88–293. COMMUNITY FOR CREATIVE NON-VIOLENCE ET AL. *v.* REID. C. A. D. C. Cir. [Certiorari granted, 488 U. S. 940.] Motion of Volunteer Lawyers for the Arts Inc. et al. for leave to file a brief as *amici curiae* granted.

No. 88–309. WYOMING *v.* UNITED STATES ET AL. Sup. Ct. Wyo. [Certiorari granted, 488 U. S. 1040.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 88–1105. GUIDRY *v.* SHEET METAL WORKERS NATIONAL PENSION FUND ET AL. C. A. 10th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 88–6265. CARLSON ET UX. *v.* COUNTY OF HENNEPIN, MINNESOTA, ET AL. Ct. App. Minn. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 20, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–6285. IN RE TODD; and

No. 88–6334. IN RE JONES. Petitions for writs of mandamus denied.

Certiorari Granted

No. 88–928. WHITE, EXECUTOR OF THE ESTATE OF SMITH *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 853 F. 2d 107.

No. 88–995. NORTHBROOK NATIONAL INSURANCE CO. *v.* BREWER. C. A. 5th Cir. Certiorari granted. Reported below: 854 F. 2d 742.

No. 87–2012. FW/PBS, INC., DBA PARIS ADULT BOOKSTORE II, ET AL. *v.* CITY OF DALLAS ET AL.;

No. 87–2051. M. J. R., INC., ET AL. *v.* CITY OF DALLAS; and

No. 88–49. BERRY ET AL. *v.* CITY OF DALLAS ET AL. C. A. 5th Cir. Motion of Citizens For Decency Through Law, Inc., for leave to file a brief as *amicus curiae* in No. 87–2012 granted. Certiorari granted in No. 87–2012 limited to Questions I, II, and III presented by the petition. Certiorari granted in No. 87–2051 limited to Questions 1 and 2 presented by the petition. Certiorari granted in No. 88–49. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 837 F. 2d 1298.

No. 88–5050. HOLLAND *v.* ILLINOIS. Sup. Ct. Ill. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 121 Ill. 2d 136, 520 N. E. 2d 270.

No. 88–6025. DOWLING *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 855 F. 2d 114.

Certiorari Denied

No. 87–1283. HIGGINS *v.* CITY OF VALLEJO, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 823 F. 2d 351.

No. 87–1754. CITY OF SOUTH BEND ET AL. *v.* JANOWIAK. C. A. 7th Cir. Certiorari denied. Reported below: 836 F. 2d 1034.

No. 87–2022. ANDERSON ET AL. *v.* SLATTERY GROUP, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 836 F. 2d 1512.

No. 87–2052. M. E. F. ENTERPRISES, INC., ET AL. *v.* CITY OF HOUSTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 837 F. 2d 1268.

No. 87–5813. YATES *v.* HARDIMAN, EXECUTIVE DIRECTOR OF THE COOK COUNTY DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 830 F. 2d 195.

No. 87–5816. NEWSOME *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 828 F. 2d 21.

No. 87–5884. MILLER *v.* O'LEARY, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 828 F. 2d 22.

No. 87–6031. ROMAN *v.* ABRAMS, ATTORNEY GENERAL OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 822 F. 2d 214.

No. 87–6154. SCHREIBER *v.* SALAMACK, SUPERINTENDENT, EDGECOMBE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 822 F. 2d 214.

No. 87–6302. SMITH *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 737 S. W. 2d 731.

No. 87–6789. HARREN *v.* THORNBURG, ATTORNEY GENERAL OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 836 F. 2d 546.

No. 88–828. BIAGGI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 853 F. 2d 89.

No. 88–892. KINOY *v.* TOLSON, EXECUTOR OF THE ESTATE OF HOOVER, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 851 F. 2d 591.

No. 88–907. SKELTON *v.* ACTION. C. A. D. C. Cir. Certiorari denied.

No. 88–919. MCCARTHY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 850 F. 2d 558.

No. 88–924. GRONDA *v.* NEWMAN, ACTING SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 36.

No. 88-940. BANK ONE, STEVENS POINT, NA *v.* UNITED STATES DEPARTMENT OF COMMERCE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 854 F. 2d 223.

No. 88-947. HARRISON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 854 F. 2d 263.

No. 88-948. CITY OF BRUNSWICK, GEORGIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 849 F. 2d 501.

No. 88-966. SWEENEY ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 166 Ill. App. 3d 1147, 537 N. E. 2d 465.

No. 88-979. BAUM ET AL. *v.* NOLAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 853 F. 2d 1071.

No. 88-990. DEHAL *v.* FRANK, POSTMASTER GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 154.

No. 88-999. FRACCOLA *v.* CITY OF UTICA ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 135 App. Div. 2d 1112, 523 N. Y. S. 2d 292.

No. 88-1064. MILLER *v.* CONAGRA, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 846 F. 2d 1383.

No. 88-1085. ESTATE OF WILLIS ET AL. *v.* ESTATE OF RILEY ET AL. C. A. 5th Cir. Certiorari denied.

No. 88-1098. BERG *v.* HUNTER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 854 F. 2d 238.

No. 88-1101. MADISON *v.* DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION. Ct. App. D. C. Certiorari denied.

No. 88-1103. WILDER ET AL. *v.* NEW YORK STATE URBAN DEVELOPMENT CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 854 F. 2d 605.

No. 88-1115. WILMOTH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 88-1122. GOETZ *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 73 N. Y. 2d 751, 532 N. E. 2d 1273.

No. 88–1124. CITY OF BERWYN ET AL. *v.* PIZZATO'S INC. ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 168 Ill. App. 3d 796, 523 N. E. 2d 51.

No. 88–1129. ALWAN BROTHERS CO. ET AL. *v.* GNIDOVEC ET AL. Sup. Ct. Ky. Certiorari denied.

No. 88–1130. NUTRI/SYSTEM, INC., ET AL. *v.* HERSKOWITZ ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 857 F. 2d 179.

No. 88–1131. HARBOR INSURANCE CO. *v.* CROW ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 94.

No. 88–1132. FINN *v.* CHEVRON, U. S. A., INC. C. A. 9th Cir. Certiorari denied. Reported below: 851 F. 2d 1227.

No. 88–1134. SMITH *v.* COMBUSTION ENGINEERING, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 196.

No. 88–1135. LARRANCE *v.* ILLINOIS HUMAN RIGHTS COMMISSION ET AL. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 166 Ill. App. 3d 224, 519 N. E. 2d 1203.

No. 88–1137. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW *v.* MACK TRUCKS, INC. C. A. 3d Cir. Certiorari denied. Reported below: 856 F. 2d 579.

No. 88–1140. LUDWIG *v.* EVERGREEN OVERLOOK, INC., ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 75 Md. App. 731.

No. 88–1172. GOWNARIS ET VIR *v.* UNITED STATES POSTAL SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 250.

No. 88–1183. WHITE, WARDEN *v.* CHATOM. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 1479.

No. 88–1196. GOREE ET AL. *v.* LAVELLE ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 169 Ill. App. 3d 696, 523 N. E. 2d 1078.

No. 88–1205. HAGGERTY *v.* CITY OF POMPANO BEACH, FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 530 So. 2d 1023.

No. 88–1219. BIELICKI ET UX. *v.* PAKISTAN NATIONAL SHIPPING CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 857 F. 2d 1463.

No. 88–1226. BRYANT *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Alameda. Certiorari denied.

No. 88–1230. MANUEL *v.* VETERANS ADMINISTRATION HOSPITAL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 857 F. 2d 1112.

No. 88–1231. MOELLER *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1086.

No. 88–1235. BOINEAU *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 856 F. 2d 187.

No. 88–1251. VELEZ ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1425.

No. 88–1262. BURKE, AKA OWENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 863 F. 2d 886.

No. 88–1287. MURRAY ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 864 F. 2d 148.

No. 88–5415. REEDY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 845 F. 2d 239.

No. 88–5668. BRUNI *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 847 F. 2d 561.

No. 88–5681. WORKMAN *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 197.

No. 88–5849. DAVIS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 763 P. 2d 109.

No. 88–6030. BOWDEN, AKA DRAKEFORD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 743.

No. 88–6140. BONACCI ET AL. *v.* KINDT, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 1278.

No. 88-6243. HEFNER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 88-6245. CLARK *v.* FORTNEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 857 F. 2d 789.

No. 88-6264. CAMBRIDGE *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 859 F. 2d 526.

No. 88-6268. MAYNARD *v.* MARION POWER SHOVEL, DIVISION OF DRESSER INDUSTRIES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 852 F. 2d 1287.

No. 88-6269. FOURNETTE *v.* BUTLER, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 860 F. 2d 436.

No. 88-6270. JARVIS *v.* MEARES, SUPERINTENDENT, GASTON FACILITY, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 838 F. 2d 1210.

No. 88-6271. HARRELL *v.* BORG, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 88-6274. VILLAMOR *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 860 F. 2d 1091.

No. 88-6275. RILEY *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 925.

No. 88-6282. ELSWICK *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 720.

No. 88-6283. CURLEY *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 853 F. 2d 926.

No. 88-6286. PEREZ *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 524 So. 2d 720.

No. 88-6288. GUTIERREZ *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1423.

No. 88–6289. JACKSON *v.* SOUTH TEXAS COLLEGE OF LAW ET AL. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 88–6292. DAVIS-EL *v.* ROBINSON. C. A. 4th Cir. Certiorari denied. Reported below: 852 F. 2d 565.

No. 88–6295. MILLS *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 88–6296. SPICKLER *v.* DUBE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 852 F. 2d 564.

No. 88–6297. SMALL *v.* BUMGARNER, SUPERINTENDENT, SOUTHERN CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 266.

No. 88–6298. MADDOX *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 88–6299. NOBLES *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex. Certiorari denied.

No. 88–6300. SANDERS *v.* LANE, ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 861 F. 2d 1033.

No. 88–6301. SULTANA *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 204 Cal. App. 3d 511, 251 Cal. Rtpr. 115.

No. 88–6307. TINGHITELLA *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 88–6309. TAYLOR *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 266.

No. 88–6311. ZATKO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 88–6313. STORY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 724.

No. 88–6328. MCCABE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 88–6340. BARR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 1278.

No. 88–6354. ASANTE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 88–6362. HARDIN *v.* MAKOWSKI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 883.

No. 88–6367. BARNHILL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 249.

No. 88–6369. DAWSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 889.

No. 88–6371. AFFLECK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 97.

No. 88–6377. RICHARDSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 274 U. S. App. D. C. 58, 861 F. 2d 291.

No. 88–6378. SHOOK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 863 F. 2d 887.

No. 88–6382. KABIR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 261.

No. 88–6389. VENNES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 871 F. 2d 1091.

No. 88–6398. SLAUGHTER *v.* MOODY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 859 F. 2d 919.

No. 88–6400. SCHLEICHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 862 F. 2d 1320.

No. 88–6406. ZULUETA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 859 F. 2d 1321.

No. 88–6407. MORSE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 861 F. 2d 269.

No. 88–6413. LANDRIE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 721.

No. 88–6419. CHAMBERS *v.* DUCHARME, SUPERINTENDENT, WASHINGTON STATE REFORMATORY. C. A. 9th Cir. Certiorari denied. Reported below: 862 F. 2d 875.

No. 88–6421. REEVES *v.* REED. Sup. Ct. Alaska. Certiorari denied.

No. 88–6426. ROBERTS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 859 F. 2d 593.

No. 87–889. COMPOY, WARDEN *v.* TURNER. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 827 F. 2d 526.

No. 87–5617. LINDSEY *v.* SMITH, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir.;
No. 87–6740. DAVIS *v.* ILLINOIS. Sup. Ct. Ill.;
No. 87–7103. SIMMONS *v.* KENTUCKY. Sup. Ct. Ky.;
No. 88–5082. WILLIS *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. C. A. 11th Cir.;
No. 88–5473. HORSLEY *v.* ALABAMA. Ct. Crim. App. Ala.;
No. 88–5687. EDWARDS *v.* BLACK, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir.;
No. 88–5828. DUNKINS *v.* THIGPEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir.;
No. 88–6237. CUNNINGHAM *v.* ZANT, WARDEN. Sup. Ct. Ga.;
No. 88–6310. BROWN *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–6383. KIRKPATRICK *v.* CALIFORNIA. Sup. Ct. Cal.; and
No. 88–6410. NAVE *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: No. 87–5617, 820 F. 2d 1137; No. 87–6740, 119 Ill. 2d 61, 518 N. E. 2d 78; No. 87–7103, 746 S. W. 2d 393; No. 88–5082, 838 F. 2d 1510; No. 88–5473, 527 So. 2d 1355; No. 88–5687, 849 F. 2d 204; No. 88–5828, 854 F. 2d 394; No. 88–6310, 46 Cal. 3d 432, 758 P. 2d 1135; No. 88–6410, 757 S. W. 2d 249.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–581. UNITED STATES *v.* STILL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 850 F. 2d 607.

No. 88–1019. BERKSON *v.* DEL MONTE CORP. ET AL. C. A. 1st Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 852 F. 2d 564.

No. 88–1136. CONNECTICUT NATIONAL BANK *v.* HERSKOWITZ ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 857 F. 2d 179.

No. 88–5343. FARMER *v.* SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS. Sup. Ct. Nev. Certiorari denied. Reported below: 104 Nev. 856.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case.

Even if I did not hold these views, however, I would still grant this petition. Petitioner's argument here is that evidence was admitted at the penalty phase of his trial in violation of *Booth* v. *Maryland*, 482 U. S. 496 (1987), where we held that the Eighth Amendment prohibits a capital sentencing jury from considering victim impact statement evidence. This argument is hardly frivolous. The prosecutor at petitioner's trial described at some length the devastating emotional impact upon the mother of the man petitioner killed. He told the jury, among other things, that petitioner "shattered some other lives psychologically"; that the victim's mother has "repeated nightmares, crying, and I can see the crying for myself. Extremely emotionally traumatic"; and that petitioner "[n]ever thought about the victims. Never gave the families of the victims, a thought." The Nevada Supreme Court, however, refused to consider the merits of this *Booth* claim. It held that petitioner's claim was barred because he had not raised it below, and because this Court has given no indication that *Booth* operates retroactively.

I am unpersuaded by these arguments. The fact that petitioner did not raise a *Booth* claim below rather obviously reflects the fact that *Booth* had not been handed down at the time. Petitioner should not be penalized for not being prescient. As for the Nevada court's second ground for rejecting petitioner's appeal, I believe that the issue whether *Booth* should have retroactive operation very much warrants this Court's attention. The abusive use by the prosecutor in this case of references to victim impact—information we held in *Booth* to be thoroughly irrelevant in capital sentencing proceedings, see 482 U. S., at 502–509 provides a graphic illustration of the harm done by decisions, like the one below, allowing *Booth* to be applied only prospectively.

Rehearing Denied. (See also No. 114, Orig., *supra.*)

No. 88–845. BIBB ET UX. *v.* UNITED STATES, 488 U. S. 1010;
No. 88–5271. EATON *v.* LOUISIANA, 488 U. S. 1019;
No. 88–5600. GILLIARD *v.* SCROGGY, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL., 488 U. S. 1019;
No. 88–5670. LONCHAR *v.* GEORGIA, 488 U. S. 1019;
No. 88–5785. O'LEARY *v.* YARMOSKY, 488 U. S. 999; and
No. 88–5920. BURGEST *v.* GEARINGER, WARDEN, 488 U. S. 1016. Petitions for rehearing denied.

No. 87–1896. ROSENTHAL *v.* STATE BAR OF CALIFORNIA, 488 U. S. 805 and 987. Motion of appellant for leave to file second petition for rehearing denied.

MARCH 6, 1989

Appointment of Librarian

It is ordered that Shelley L. Dowling be appointed Librarian of the Court to succeed Stephen G. Margeton, effective January 15, 1989, and that she take the oath of office as required by statute.

Affirmed on Appeal

No. 87–1860. MILLIKEN ET AL. *v.* MICHIGAN ROAD BUILDERS ASSN., INC., ET AL. Affirmed on appeal from C. A. 6th Cir. Reported below: 834 F. 2d 583.

Appeal Dismissed

No. 88–977. COLORADO-UTE ELECTRIC ASSN., INC., ET AL. *v.* PUBLIC UTILITIES COMMISSION OF COLORADO ET AL. Appeal

from Sup. Ct. Colo. dismissed for want of properly presented federal question. Reported below: 760 P. 2d 627.

Certiorari Granted—Vacated and Remanded

No. 87-1001. H. K. PORTER CO., INC. *v.* METROPOLITAN DADE COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469 (1989). JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS would deny certiorari. Reported below: 825 F. 2d 324.

No. 88-802. SMITH ET AL. *v.* STONEKING. C. A. 3d Cir. Motion of petitioners to consolidate this case with No. 88-1350, *Smith* v. *Sowers*, denied. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *DeShaney* v. *Winnebago County Dept. of Social Services*, *ante*, p. 189. Reported below: 856 F. 2d 594.

No. 88-816. CITY OF NEW KENSINGTON ET AL. *v.* HORTON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF POWDRILL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *DeShaney* v. *Winnebago County Dept. of Social Services*, *ante*, p. 189. Reported below: 857 F. 2d 1464.

Miscellaneous Orders

No. ——. LATHEN *v.* UNITED STATES. Application for extension of time within which to file petition for writ of certiorari out of time denied.

No. ——. WARD ET AL. *v.* FREEDMAN. Motion of petitioners for leave to file petition for writ of certiorari under seal denied.

No. A-624. BOYCE *v.* ISRAELITE BIBLE CLASS, INC. App. Ct. Ill., 5th Dist. Application for stay, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

No. A-690 (88-6635). WILLIAMS *v.* KEMP, WARDEN. C. A. 11th Cir. Application of the Attorney General of Georgia to vacate the stay of execution granted by the United States Court of Appeals for the Eleventh Circuit, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

No. 112, Orig. WYOMING *v.* OKLAHOMA. It is ordered that the Hon. Philip W. Tone, of Chicago, Ill., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Special Master is directed to submit such reports as he may deem appropriate.

The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. [For earlier order herein, see, *e. g.*, 488 U. S. 921.]

No. 88–333. ALABAMA *v.* SMITH. Sup. Ct. Ala. [Certiorari granted, 488 U. S. 1003.] Motion for appointment of counsel granted, and it is ordered that Delores Boyd, Esq., of Montgomery, Ala., be appointed to serve as counsel for respondent in this case.

No. 88–412. HOFFMAN, TRUSTEE *v.* CONNECTICUT DEPARTMENT OF INCOME MAINTENANCE ET AL. C. A. 2d Cir. [Certiorari granted, 488 U. S. 1003.] Motion of INSLAW, Inc., for leave to file a brief as *amicus curiae* granted.

No. 88–515. SABLE COMMUNICATIONS OF CALIFORNIA, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 88–525. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* SABLE COMMUNICATIONS OF CALIFORNIA, INC. D. C. C. D. Cal. [Probable jurisdiction noted, 488 U. S. 1003.] Motions of United States Catholic Conference, American Family Association, Inc., and Morality in Media, Inc., for leave to file briefs as *amici curiae* granted.

No. 88–605. WEBSTER, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* REPRODUCTIVE HEALTH SERVICES ET AL. C. A. 8th Cir. [Probable jurisdiction noted, 488 U. S. 1003.] Motions of James Joseph Lynch, Jr., and National Legal Foundation for leave to file briefs as *amici curiae* granted. Motion of Legal Defense for Unborn Children for leave to file a brief as *amicus curiae* denied. Motion of Alan Ernest for leave to represent children unborn and born alive denied.

No. 88–1083. JOHN DOE AGENCY ET AL. *v.* JOHN DOE CORP. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1009.] Motion of respondent to advance oral argument denied.

No. 88–1281. NGIRAINGAS ET AL. *v.* SANCHEZ ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. JUSTICE KENNEDY took no part in the consideration or decision of this order.

No. 88–6352. BURKART *v.* POST-BROWNING, INC. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 27, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 88–6415. IN RE ABDULLAH, AKA WHITE; and

No. 88–6538. IN RE SINDRAM. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 87–1965. ZINERMON ET AL. *v.* BURCH. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 840 F. 2d 797.

No. 88–599. WASHINGTON ET AL. *v.* HARPER. Sup. Ct. Wash. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 110 Wash. 2d 873, 759 P. 2d 358.

No. 88–854. SPALLONE *v.* UNITED STATES ET AL.;

No. 88–856. CHEMA *v.* UNITED STATES ET AL.; and

No. 88–870. LONGO ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari granted in No. 88–854. Certiorari granted in No. 88–856 limited to Questions 1 through 5 presented by the petition. Certiorari granted in No. 88–870. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 856 F. 2d 444.

Certiorari Denied

No. 87–521. LEDBETTER, COMMISSIONER OF GEORGIA DEPARTMENT OF HUMAN RESOURCES, ET AL. *v.* TAYLOR. C. A. 11th Cir. Certiorari denied. Reported below: 818 F. 2d 791.

No. 87–1926. UPPER DARBY TOWNSHIP ET AL. *v.* COLBURN, ADMINISTRATRIX OF THE ESTATE OF STIERHEIM. C. A. 3d Cir. Certiorari denied. Reported below: 838 F. 2d 663.

No. 87–2034. BARBERA, ADMINISTRATRIX OF THE GOODS, CHATTELS, AND CREDITS OF BARBERA *v.* SCHLESSINGER, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 836 F. 2d 96.

No. 87–2054. O'CONNOR ET AL. *v.* ESTATE OF CONNERS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 846 F. 2d 1205.

No. 87–2120. JORDA *v.* CITY OF NEW BRUNSWICK ET AL. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 214 N. J. Super. 338, 519 A. 2d 874.

No. 88–576. ARCHIE ET AL. *v.* CITY OF RACINE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 847 F. 2d 1211.

No. 88–684. MAINE ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 271 U. S. App. D. C. 276, 852 F. 2d 574.

No. 88–796. MCINTOSH ET AL. *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 296 Ark. 167, 753 S. W. 2d 273.

No. 88–810. DISTRICT OF COLUMBIA *v.* PARKER ET UX. C. A. D. C. Cir. Certiorari denied. Reported below: 271 U. S. App. D. C. 15, 850 F. 2d 708.

No. 88–841. STEVENS *v.* TILLMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 855 F. 2d 394.

No. 88–847. SIMS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 531 So. 2d 71.

No. 88–855. CITY OF YONKERS *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 856 F. 2d 444.

No. 88–905. KOHLMAN *v.* BOB MARSHALL ALLIANCE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1223.

No. 88–953. PHENIX FEDERAL SAVINGS & LOAN ASSN. *v.* SHEARSON LEHMAN HUTTON, INC. C. A. 8th Cir. Certiorari denied. Reported below: 856 F. 2d 1125.

No. 88–967. SCOTTO ET AL. *v.* UNITED STATES; and
No. 88–1027. ZAUBER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 857 F. 2d 137.

No. 88–968. BROTHERHOOD OF LOCOMOTIVE ENGINEERS *v.* NEWTON ET AL.;
No. 88–994. CHICAGO & NORTH WESTERN TRANSPORTATION CO. *v.* BEARDSLY ET AL.;
No. 88–1169. UNITED TRANSPORTATION UNION *v.* BEARDSLY ET AL.;
No. 88–1176. NEWTON ET AL. *v.* BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL.; and
No. 88–1184. BEARDSLY ET AL. *v.* CHICAGO & NORTH WESTERN TRANSPORTATION CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 850 F. 2d 1255.

No. 88–974. KIAMICHI AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT NO. 7 *v.* SHORT; and
No. 88–1148. SHORT *v.* KIAMICHI AREA VOCATIONAL-TECHNICAL SCHOOL DISTRICT NO. 7. Sup. Ct. Okla. Certiorari denied. Reported below: 761 P. 2d 472.

No. 88–982. WALL STREET PUBLISHING INSTITUTE, INC. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 271 U. S. App. D. C. 110, 851 F. 2d 365.

No. 88–1052. JOHNS-MANVILLE CORP. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 855 F. 2d 1556.

No. 88–1100. TENNESSEE WILDLIFE RESOURCES AGENCY *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 24.

No. 88–1138. DELTA AIR LINES, INC. *v.* CRISWELL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 1088.

No. 88–1143. NATIONAL BANK & TRUST CO. OF NORTH AMERICA, LTD., DBA NATCORP *v.* BANCO DE VIZCAYA, S. A. Ct. App. N. Y. Certiorari denied. Reported below: 72 N. Y. 2d 1005, 531 N. E. 2d 634.

No. 88–1145. DONG-A ILBO ET AL. *v.* LEE; and
No. 88–1163. CENTRAL VIRGINIA EDUCATIONAL TELEVISION CORP. *v.* LEE. C. A. 4th Cir. Certiorari denied. Reported below: 849 F. 2d 876.

No. 88–1149. CESSNA AIRCRAFT CO. *v.* BUTCHER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 850 F. 2d 247.

No. 88–1168. SWAIN ET AL. *v.* LINDSEY. Ct. App. Ky. Certiorari denied.

No. 88–1181. CUNNINGHAM, PER NEXT FRIEND, CUNNINGHAM, ET AL. *v.* BEAVERS, SUPERINTENDENT OF SCHOOLS, JACKSONVILLE INDEPENDENT SCHOOL DISTRICT, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 858 F. 2d 269.

No. 88–1185. WALTERS *v.* FIRST TENNESSEE BANK, N. A. MEMPHIS. C. A. 6th Cir. Certiorari denied. Reported below: 855 F. 2d 267.

No. 88–1195. SERE *v.* HEADQUARTERS, DEFENSE COMMUNICATIONS AGENCY. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 265.

No. 88–1224. REED *v.* NORTHWESTERN PUBLISHING CO., DBA COMMERCIAL NEWS, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 124 Ill. 2d 495, 530 N. E. 2d 474.

No. 88–1257. KERTESZ *v.* UNIVERSITY OF SOUTHERN CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 88–1276. MACHEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 2d 315.

No. 88–1301. PUGLIESE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 860 F. 2d 25.

No. 88–1307. POSNER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 863 F. 2d 1319.

No. 88–1312. ESTATE OF CORNETT ET AL. *v.* ESTATE OF SIKES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 716.

No. 88–1326. SCIARRA ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 252.

No. 88–5062. MOLTON, ADMINISTRATOR FOR THE ESTATE OF MOLTON *v.* CITY OF CLEVELAND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 839 F. 2d 240.

No. 88–5878. PRENZLER *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–5966. MCDONALD *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 88–6008. MUHAMMAD *v.* QUINLAN, DIRECTOR, BUREAU OF PRISONS, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 845 F. 2d 175.

No. 88–6026. GRIDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 850 F. 2d 1500.

No. 88–6063. YAGOW *v.* PRODUCTION CREDIT ASSOCIATION OF FARGO. C. A. 8th Cir. Certiorari denied.

No. 88–6064. YAGOW *v.* PRODUCTION CREDIT ASSOCIATION OF FARGO. C. A. 8th Cir. Certiorari denied.

No. 88–6073. YAGOW *v.* PRODUCTION CREDIT ASSOCIATION OF FARGO. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1086.

No. 88–6105. BELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 726.

No. 88–6212. ROBINSON *v.* UNITED STATES; and
No. 88–6331. BLANKENSHIP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 862 F. 2d 316.

No. 88–6258. POTTS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 258 Ga. 430, 369 S. E. 2d 746.

No. 88–6293. ROBINSON *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 199.

No. 88–6319. REDWINE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 188 Ga. App. 638, 373 S. E. 2d 804.

No. 88–6320. BROWN *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 88–6321. BROWN *v.* VIRGINIA. Ct. App. Va. Certiorari denied.

No. 88–6324. BOYD *v.* PUCKETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 717.

No. 88–6329. PARKER *v.* SUMNER, DIRECTOR, NEVADA DEPARTMENT OF PRISONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 88–6335. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 266.

No. 88–6336. CHIPPS *v.* UNITED STATES DEPARTMENT OF EDUCATION ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–6337. ELLIOTT *v.* MYERS, SUPERINTENDENT, CORRECTIONAL TRAINING FACILITY AT SOLEDAD, CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 88–6343. BENSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 526 So. 2d 948.

No. 88–6358. HICKS *v.* FAIR, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied. Reported below: 859 F. 2d 1054.

No. 88–6372. DANIELS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 209 Conn. 225, 550 A. 2d 885.

No. 88–6373. GREEN, AKA HORNUNG *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 848 F. 2d 1040.

No. 88–6395. SHANNON *v.* KLINCAR, CHAIRMAN, ILLINOIS PRISONER REVIEW BOARD, ET AL. C. A. 7th Cir. Certiorari denied.

No. 88–6403. LONG *v.* UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT. C. A. Fed. Cir. Certiorari denied.

No. 88-6427. HARGROVE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 272 U. S. App. D. C. 248, 855 F. 2d 887.

No. 88-6430. DELGADO ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 889.

No. 88-6432. CABALLERO SALINAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1261.

No. 88-6433. COLLICOTT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 863 F. 2d 886.

No. 88-6437. BATES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 255.

No. 88-6441. PAZOS-FLORES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 862 F. 2d 878.

No. 88-6442. ROLLING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 793.

No. 88-6445. GAMBINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 863 F. 2d 886.

No. 88-6446. COLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 857 F. 2d 971.

No. 88-6451. ENTELISANO *v.* FELT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 135 App. Div. 2d 1096, 523 N. Y. S. 2d 314.

No. 88-6452. RAMEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 863 F. 2d 889.

No. 88-6459. SOLOMON *v.* UNITED STATES; and
No. 88-6499. SOLOMON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 1572.

No. 88-6462. GARCIA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1424.

No. 88-6465. BRYANT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 859 F. 2d 151.

No. 88-6478. ORTIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 857 F. 2d 900.

No. 88–6487. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 792.

No. 88–6488. LONGMIRE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 461.

No. 88–6492. WEISMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 858 F. 2d 389.

No. 88–6495. ADEYEMI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 2d 870.

No. 88–6498. PACKARD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 793.

No. 87–1460. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* HARGRAVE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 832 F. 2d 1528.

No. 87–2073. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* MANN. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 844 F. 2d 1446.

No. 88–800. DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. *v.* STONE. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 837 F. 2d 1477.

No. 88–1074. VIRGINIA ET AL. *v.* STOCKTON. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 852 F. 2d 740.

No. 88–958. COOPER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 860 F. 2d 1076.

No. 88–5136. GROSSMAN *v.* FLORIDA. Sup. Ct. Fla.;
No. 88–5169. SPISAK *v.* OHIO. Sup. Ct. Ohio;
No. 88–5216. HARICH *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 88–5582. FORD *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;
No. 88–5750. CLARK *v.* OHIO. Sup. Ct. Ohio;
No. 88–5799. BEUKE *v.* OHIO. Sup. Ct. Ohio;

No. 88–6005. STEWART *v.* ILLINOIS. Sup. Ct. Ill.;
No. 88–6121. PRESTON *v.* FLORIDA. Sup. Ct. Fla.;
No. 88–6187. MCLAIN *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–6224. HENDERSON *v.* OHIO. Sup. Ct. Ohio;
No. 88–6287. IRICK *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 88–6317. MAURER *v.* OHIO. Ct. App. Ohio, Stark County; and
No. 88–6353. BEDFORD *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: No. 88–5136, 525 So. 2d 833; No. 88–5169, 36 Ohio St. 3d 80, 521 N. E. 2d 800; No. 88–5216, 844 F. 2d 1464; No. 88–5582, 522 So. 2d 345; No. 88–5750, 38 Ohio St. 3d 252, 527 N. E. 2d 844; No. 88–5799, 38 Ohio St. 3d 29, 526 N. E. 2d 274; No. 88–6005, 123 Ill. 2d 368, 528 N. E. 2d 631; No. 88–6121, 528 So. 2d 896; No. 88–6187, 46 Cal. 3d 97, 757 P. 2d 569; No. 88–6224, 39 Ohio St. 3d 24, 528 N. E. 2d 1237; No. 88–6287, 762 S. W. 2d 121; No. 88–6353, 39 Ohio St. 3d 122, 529 N. E. 2d 913.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–6326 (A–600). COCKRUM *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of mandate, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 758 S. W. 2d 577.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application and the petition for writ of certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 86–1650. TRANS WORLD AIRLINES, INC. *v.* INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, 485 U. S. 175;
No. 87–2121. DOBARD *v.* OSCAR DASTE & SONS, INC., 488 U. S. 828;

No. 88–836. ASAM *v.* SHAPIRO ET AL., 488 U. S. 1024;

No. 88–838. NIEVES *v.* MARINA GARDENS NO. 1, INC., 488 U. S. 1024;

No. 88–5561. GILMORE *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, 488 U. S. 1031;

No. 88–5910. TALLMAN *v.* KELLEY, 488 U. S. 1025;

No. 88–5942. ROBERTSON *v.* CITY OF EUNICE, NEW MEXICO, 488 U. S. 1033; and

No. 88–5960. DODRILL *v.* TATE, SUPERINTENDENT, CHILLICOTHE CORRECTIONAL INSTITUTE, 488 U. S. 1044. Petitions for rehearing denied.

MARCH 14, 1989

Dismissal Under Rule 53

No. 88–5708. SHRAGAI *v.* SHRAGAI. Ct. App. N. Y. Certiorari dismissed under this Court's Rule 53. Reported below: 71 N. Y. 2d 949, 524 N. E. 2d 147.

Certiorari Denied

No. 88–6721 (A–696). BEAM *v.* IDAHO. Sup. Ct. Idaho. Application to continue stay of execution of death warrant, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 115 Idaho 208, 766 P. 2d 678.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

MARCH 15, 1989

Miscellaneous Order

No. A–727. WHITMORE, INDIVIDUALLY AND AS NEXT FRIEND OF SIMMONS *v.* ARKANSAS. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates

automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

MARCH 16, 1989

Dismissal Under Rule 53

No. 88–1021. HANSCH ET UX. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari dismissed under this Court's Rule 53.

MARCH 20, 1989

Appeals Dismissed

No. 88–844. CHRISMAN *v.* TIMES MIRROR CO. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 88–1013. DELEO ET UX. *v.* ANTHONY A. NUNES, INC., ET AL. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 546 A. 2d 1344.

No. 88–6386. JENKINS *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction.

No. 88–6471. CRIM *v.* MORRIS, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY, ET AL. Appeal from C. A. 6th Cir. dismissed for want of jurisdiction. Reported below: 853 F. 2d 926.

Miscellaneous Orders

No. A–601 (88–1243). COMPANY X *v.* UNITED STATES. C. A. 10th Cir. Renewed application for stay, presented to JUSTICE WHITE, and by him referred to the Court, granted pending final disposition of the petition for writ of certiorari.

No. A–695. MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS ET AL. *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Application for stay, presented to JUSTICE BRENNAN, and by him referred to the Court, denied. The order heretofore entered March 4, 1989, by JUSTICE BRENNAN is va-

cated. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application.

No. A–709 (88–709). ROE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN (DOE, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Application to continue the stay entered by the Superior Court of California, County of Marin, on March 3, 1989, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied.

No. D–536. IN RE DISBARMENT OF LOVETT, 475 U. S. 1092. Motion to vacate the order of disbarment denied.

No. D–751. IN RE DISBARMENT OF EBERSTEIN. Disbarment entered. [For earlier order herein, see 488 U. S. 1000.]

No. D–772. IN RE DISBARMENT OF BROWN. It is ordered that Rembert Thomas Brown, of San Diego, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–773. IN RE DISBARMENT OF GAGEN. It is ordered that William Lee Gagen, of Lebanon, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–774. IN RE DISBARMENT OF GUNDERMAN. It is ordered that James Roger Gunderman, of Buffalo, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–775. IN RE DISBARMENT OF GRAVES. It is ordered that David Hardin Graves, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 87–6997. CARELLA *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Los Angeles County. [Probable jurisdiction noted, 488 U. S. 940 and 964.] Motion of appellant to discharge appointed counsel and appoint new counsel denied.

No. 88–333. ALABAMA *v.* SMITH. Sup. Ct. Ala. [Certiorari granted, 488 U. S. 1003.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–348. NEW ORLEANS PUBLIC SERVICE INC. *v.* COUNCIL OF THE CITY OF NEW ORLEANS ET AL. C. A. 5th Cir. [Certiorari granted, 488 U. S. 1003.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–420. JONES, SUPERINTENDENT, MISSOURI TRAINING CENTER FOR MEN AT MOBERLY *v.* THOMAS. C. A. 8th Cir. [Certiorari granted, 488 U. S. 1003.] Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted. Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument denied.

No. 88–515. SABLE COMMUNICATIONS OF CALIFORNIA, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.; and

No. 88–525. FEDERAL COMMUNICATIONS COMMISSION ET AL. *v.* SABLE COMMUNICATIONS OF CALIFORNIA, INC. D. C. C. D. Cal. [Probable jurisdiction noted, 488 U. S. 1003.] Motion of Citizens for Decency Through Law, Inc., et al. for leave to file a brief as *amici curiae* in No. 88–525 granted. Motion of Minority Members of the Committee on Energy and Commerce of the United States House of Representatives for leave to file a brief as *amicus curiae* granted.

No. 88–605. WEBSTER, ATTORNEY GENERAL OF MISSOURI, ET AL. *v.* REPRODUCTIVE HEALTH SERVICES ET AL. C. A. 8th Cir. [Probable jurisdiction noted, 488 U. S. 1003.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 88–616. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* HUDSON. C. A. 11th Cir. [Certiorari granted *sub nom. Bowen, Secretary of Health and Human Services* v. *Hudson*, 488 U. S. 980.] Motion of the Acting Solicitor General to permit Amy L. Wax, Esq., to present oral argument *pro hac vice* denied.

No. 88–1114. LEBMAN ET AL. *v.* AKTIEBOLAGET ELECTROLUX ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 88–5977. WRENN *v.* THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [488 U. S. 1039] denied.

No. 88–6597. IN RE MCKNIGHT. Petition for writ of habeas corpus denied.

No. 88–1246. IN RE BEACHBOARD; and
No. 88–6390. IN RE STRABLE. Petitions for writs of mandamus denied.

Certiorari Granted

No. 88–42. HALLSTROM ET UX. *v.* TILLAMOOK COUNTY. C. A. 9th Cir. Certiorari granted. Reported below: 844 F. 2d 598.

No. 88–1203. HOFFMANN-LA ROCHE INC. *v.* SPERLING ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 862 F. 2d 439.

No. 88–1213. EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON, ET AL. *v.* SMITH ET AL. Sup. Ct. Ore. Certiorari granted. Reported below: 307 Ore. 68, 763 P. 2d 146.

Certiorari Denied. (See also Nos. 88–844 and 88–1013, *supra.*)

No. 88–276. GRIFFIN *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 88–927. KEYSTONE SHIPPING CO. *v.* NEW ENGLAND ENERGY, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 855 F. 2d 1.

No. 88–988. TOWNLEY MANUFACTURING CO., INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 610.

No. 88–1029. YONKERS RACING CORP. *v.* CITY OF YONKERS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 858 F. 2d 855.

No. 88–1034. DERRYBERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 196.

No. 88–1035. NORTHSIDE SANITARY LANDFILL, INC. *v.* REILLY, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 270 U. S. App. D. C. 387, 849 F. 2d 1516.

No. 88–1044. ASSOCIATION OF SEAT LIFT MANUFACTURERS ET AL. *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 858 F. 2d 308.

No. 88–1066. ESTATE OF JOHNSON ET AL. *v.* ENGLE ET AL.; and No. 88–1232. ENGLE ET AL. *v.* ESTATE OF JOHNSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 858 F. 2d 361.

No. 88–1068. NANAVATI *v.* BURDETTE TOMLIN MEMORIAL HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 857 F. 2d 96.

No. 88–1081. WORKMAN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 860 F. 2d 140.

No. 88–1108. NEW YORK TYPOGRAPHICAL UNION, No. 6 *v.* ROYAL COMPOSING ROOM, INC. C. A. 2d Cir. Certiorari denied. Reported below: 848 F. 2d 345.

No. 88–1111. WILKINS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 854 F. 2d 710.

No. 88–1128. CALIFORNIA *v.* FOLKINS ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 46 Cal. 3d 355, 758 P. 2d 606.

No. 88–1139. CERTIFIED REGISTERED NURSE ANESTHETISTS OF ANESTHESIA GROUP PRACTICE ET AL. *v.* ANESTHESIA GROUP PRACTICE, INC., ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: 49 Ohio App. 3d 166, 551 N. E. 2d 1308.

No. 88–1174. SIMMONS, UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF PENNSYLVANIA *v.* MOODY, TRUSTEE OF THE ESTATE OF JEANNETTE CORP., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 858 F. 2d 137.

No. 88–1175. CLARK *v.* C & O RAILWAY CO. Sup. Ct. Va. Certiorari denied.

No. 88–1180. UTILITY WORKERS UNION OF AMERICA, AFL–CIO, LOCAL NO. 246, ET AL. *v.* SOUTHERN CALIFORNIA EDISON

Co. C. A. 9th Cir. Certiorari denied. Reported below: 852 F. 2d 1083.

No. 88–1188. LEARNED *v.* CITY OF BELLEVUE, WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 928.

No. 88–1190. FRIEDMAN *v.* MONTGOMERY COUNTY, MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 75 Md. App. 725.

No. 88–1192. GRAHAM *v.* BETTIS, JUDGE, ET AL. Ct. App. Ohio, Columbiana County. Certiorari denied.

No. 88–1193. SOUTHWESTERN BELL TELEPHONE CO. *v.* CONTINENTAL CASUALTY CO. C. A. 10th Cir. Certiorari denied. Reported below: 860 F. 2d 970.

No. 88–1197. DRAKE TOWING CO., INC., ET AL. *v.* ATWOOD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 850 F. 2d 1093.

No. 88–1199. HEMON ET AL. *v.* OFFICE OF PUBLIC GUARDIAN ET AL. Sup. Ct. N. H. Certiorari denied.

No. 88–1201. HARDEN *v.* BERT ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–1202. LEIDY *v.* STRANAHAN ET AL.; and LEIDY *v.* SHARON HERALD NEWSPAPER CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 251 (first case); 862 F. 2d 308 (second case).

No. 88–1206. DELTA TRUCK & TRACTOR, INC. *v.* J. I. CASE CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 855 F. 2d 241.

No. 88–1209. BAUER ET UX. *v.* WALDSCHMIDT, TRUSTEE OF THE BANKRUPTCY ESTATE OF BAUER, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 859 F. 2d 438.

No. 88–1211. HUNT ET AL. *v.* JEFFERSON SAVINGS & LOAN ASSN. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 756 S. W. 2d 762.

No. 88–1212. HOFFMAN *v.* CITY OF TROY, MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 88–1214. LEIDHOLDT *v.* L. F. P., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 890.

No. 88–1215. AULT *v.* HUSTLER MAGAZINE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 860 F. 2d 877.

No. 88–1216. TAYLOR *v.* FIRST UNION CORPORATION OF SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 857 F. 2d 240.

No. 88–1218. MARKUM ET AL. *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 373 Pa. Super. 341, 541 A. 2d 347.

No. 88–1220. ULLMANN *v.* OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 857 F. 2d 1475.

No. 88–1221. WEISMAN *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 88–1222. HOLLYWOOD MARINE, INC. *v.* WIEDEMANN & FRANSEN. Sup. Ct. La. Certiorari denied. Reported below: 530 So. 2d 1116.

No. 88–1225. SCANDELL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 143 App. Div. 2d 423, 532 N. Y. S. 2d 424.

No. 88–1227. RUSSO *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA (BEAR, STEARNS & CO., INC., ET AL., REAL PARTIES IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 88–1233. GRANDCHAMP ET AL. *v.* UNITED AIR LINES, INC. C. A. 10th Cir. Certiorari denied. Reported below: 854 F. 2d 381.

No. 88–1234. UNITED SERVICES AUTOMOBILE ASSN. *v.* TUCK, ADMINISTRATOR OF THE ESTATE OF TUCK, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 859 F. 2d 842.

No. 88–1236. CITY OF WATSONVILLE, CALIFORNIA *v.* CRUZ GOMEZ ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 863 F. 2d 1407.

No. 88–1237. TRANSAMERICA-OCCIDENTAL LIFE INSURANCE CO. *v.* PROVIDENT LIFE & ACCIDENT INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 850 F. 2d 1489.

No. 88–1240. AINSWORTH *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 46 Cal. 3d 1218, 762 P. 2d 431.

No. 88–1241. PRICE *v.* TANNER ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 855 F. 2d 820.

No. 88–1242. HUGHES ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 852 F. 2d 568.

No. 88–1244. M/T STOLT SHEAF ET AL. *v.* NATIONAL PETROCHEMICAL COMPANY OF IRAN. C. A. 2d Cir. Certiorari denied. Reported below: 860 F. 2d 551.

No. 88–1245. DUCHESNE *v.* WILLIAMS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 849 F. 2d 1004.

No. 88–1247. CENTRAL MILK PRODUCERS COOPERATIVE *v.* NATIONAL FARMERS' ORGANIZATION; and

No. 88–1248. ASSOCIATED MILK PRODUCERS, INC., ET AL. *v.* NATIONAL FARMERS' ORGANIZATION, INC. C. A. 8th Cir. Certiorari denied. Reported below: 850 F. 2d 1286.

No. 88–1256. PELLIGRA *v.* GOODYEAR TIRE & RUBBER CO. Ct. App. Ohio, Summit County. Certiorari denied. Reported below: 41 Ohio App. 3d 61, 534 N. E. 2d 388.

No. 88–1258. COUNTY OF DUPAGE ET AL. *v.* LASALLE NATIONAL BANK OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 856 F. 2d 925.

No. 88–1261. PESTE ET AL. *v.* CLUNK, JUDGE, COURT OF COMMON PLEAS, PROBATE DIVISION, STARK COUNTY, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 861 F. 2d 721.

No. 88–1263. HOHL, ON BEHALF OF HIMSELF AND HIS DAUGHTERS, HOHL ET AL. *v.* MILLER, MAGISTRATE, CASS COUNTY MAGISTRATE'S COURT. C. A. 8th Cir. Certiorari denied.

No. 88–1267. ODOM ET AL. *v.* DELAHOUSSAYE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 859 F. 2d 919.

No. 88–1268. MADDOX *v.* AMSOUTH BANK, N. A. C. A. 11th Cir. Certiorari denied.

No. 88–1269. WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES ET AL. *v.* TORRES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 859 F. 2d 1523.

No. 88–1270. PETRAS *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 26 Mass. App. 483, 529 N. E. 2d 404.

No. 88–1277. TUCKER *v.* CONNECTICUT NATIONAL BANK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1424.

No. 88–1278. CONSOLIDATED TELEVISION CABLE SERVICE, INC. *v.* CITY OF FRANKFORT, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 857 F. 2d 354.

No. 88–1279. SUTHERLAND *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1076.

No. 88–1293. HOLMAN *v.* WALLING; and
No. 88–1355. WALL STREET REPORTS & INTELLIGENCE BULLETIN, INC. *v.* WALLING. C. A. 2d Cir. Certiorari denied. Reported below: 858 F. 2d 79.

No. 88–1294. SHARMA *v.* LOCKHEED ENGINEERING & MANAGEMENT SERVICES CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 862 F. 2d 314.

No. 88–1296. ANDREWS *v.* LOVE, JUDGE, DISTRICT COURT OF MCCLAIN COUNTY, OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 763 P. 2d 714.

No. 88–1314. CRANMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 871 F. 2d 1091.

No. 88–1334. WILLIAMS *v.* UNITED STATES DEPARTMENT OF ENERGY ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–1352. RAMACHANDRAN *v.* UNITED STATES POSTAL SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 848 F. 2d 1243.

No. 88–1359. TENLEY AND CLEVELAND PARK EMERGENCY COMMITTEE ET AL. *v.* DISTRICT OF COLUMBIA BOARD OF ZONING

ADJUSTMENT ET AL. Ct. App. D. C. Certiorari denied. Reported below: 550 A. 2d 331.

No. 88–1368. CONNOLLY ET AL. *v.* MARYLAND CASUALTY CO. C. A. 11th Cir. Certiorari denied. Reported below: 849 F. 2d 525.

No. 88–1370. GALLO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 863 F. 2d 185.

No. 88–1372. COMUNI-CENTRE BROADCASTING, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 272 U. S. App. D. C. 389, 856 F. 2d 1551.

No. 88–1375. VALDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 427.

No. 88–1386. GOICHMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 88–1387. KINSEY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 859 F. 2d 1361.

No. 88–1389. SWEARINGEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 1555.

No. 88–5043. LANDRY *v.* HOEPFNER, JUDGE. C. A. 5th Cir. Certiorari denied. Reported below: 840 F. 2d 1201.

No. 88–5231. BOUDETTE *v.* ARIZONA. Super. Ct. Ariz., Maricopa County. Certiorari denied.

No. 88–5887. COFIELD *v.* THIGPEN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 856 F. 2d 198.

No. 88–5898. BENNAFIELD *v.* CITY OF CANTON POLICE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 192.

No. 88–5939. MCFADDEN *v.* CABANA, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied. Reported below: 851 F. 2d 784.

No. 88–5970. KRISHNAN *v.* JULIUS. Sup. Ct. Cal. Certiorari denied.

No. 88–5998. HAMM *v.* PACKARD, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 689.

No. 88–6096. AUCOIN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 756 S. W. 2d 705.

No. 88–6108. GRIMES *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 515 So. 2d 156.

No. 88–6126. WHITWORTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 856 F. 2d 1268.

No. 88–6188. TOTH *v.* PENNSYLVANIA BOARD OF PROBATION AND PAROLE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 860 F. 2d 1076.

No. 88–6193. CORONA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 849 F. 2d 562.

No. 88–6207. BAKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 857 F. 2d 1479.

No. 88–6236. BLAIR *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 88–6260. MURRAY *v.* DEPARTMENT OF THE ARMY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 842 F. 2d 1291.

No. 88–6267. COOK *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 531 So. 2d 1369.

No. 88–6327. BOUVIER-MOORE *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 88–6338. WALLS *v.* NEW CASTLE COUNTY POLICE DEPARTMENT ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 553 A. 2d 639.

No. 88–6342. BOYLAN *v.* FRANK, POSTMASTER GENERAL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 743.

No. 88–6345. CORDES *v.* TULSA CITY POLICE DEPARTMENT ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–6346. CHAMBERS *v.* GOODWIN, SUPERINTENDENT, CENTRAL CORRECTIONAL INSTITUTION AT MACON, GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 88–6366. KEENAN *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 264.

No. 88–6370. LOPEZ *v.* SUPERIOR COURT OF CALIFORNIA, SAN JOAQUIN COUNTY, ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 88–6374. DOMINGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 861 F. 2d 1280.

No. 88–6379. KURINA *v.* HAWS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 853 F. 2d 1409.

No. 88–6380. ALTIZER *v.* OHIO. Ct. App. Ohio, Lake County. Certiorari denied.

No. 88–6381. HEBEL *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 174 Ill. App. 3d 1, 527 N. E. 2d 1367.

No. 88–6384. GRACIANO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 860 F. 2d 1073.

No. 88–6391. BROWN, AKA ALI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 774 F. 2d 1156.

No. 88–6392. MARTIN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 379 Pa. Super. 661, 545 A. 2d 386.

No. 88–6396. MATUSAVAGE *v.* GENERAL SERVICES ADMINISTRATION. C. A. Fed. Cir. Certiorari denied. Reported below: 838 F. 2d 1222.

No. 88–6397. RAMIREZ *v.* AHN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 843 F. 2d 864.

No. 88–6399. MILLER *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 850 F. 2d 689.

No. 88–6402. SCOTT *v.* PARSONS, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88–6408. MALONEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 857 F. 2d 789.

No. 88–6409. WEAVER *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 88–6411. DEAN *v.* SEABOLD, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 257.

No. 88–6412. MORLETT *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 851 F. 2d 1521.

No. 88–6414. KETTLESON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1087.

No. 88–6417. DEMOS *v.* SUPREME COURT OF WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 88–6420. PRICE *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1259.

No. 88–6422. KRAUS ET UX. *v.* CRETE STATE BANK. Sup. Ct. Neb. Certiorari denied. Reported below: 229 Neb. xxii.

No. 88–6423. MOLINA *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 533 So. 2d 701.

No. 88–6425. PRYMER *v.* ANDERBERG. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 88–6428. MAULICK *v.* ISRAEL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 861 F. 2d 265.

No. 88–6429. EDLIN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 533 So. 2d 403.

No. 88–6431. BRENNAN *v.* CITY OF MOUNT DORA, LAKE COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 858 F. 2d 743.

No. 88–6436. WAYNO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 88–6439. DENIAL *v.* SMITH, SECRETARY, PENNSYLVANIA DEPARTMENT OF EDUCATION. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 250.

No. 88-6449. BANDA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 536 So. 2d 221.

No. 88-6453. RIVAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 862 F. 2d 873.

No. 88-6454. SAHAGIAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 864 F. 2d 509.

No. 88-6455. MALDONADO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 143 App. Div. 2d 559, 532 N. Y. S. 2d 953.

No. 88-6456. SAYLES *v.* CIRCUIT COURT OF BEDFORD COUNTY, VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 88-6460. MUETZE *v.* SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 871 F. 2d 1093.

No. 88-6461. LAMPACK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 862 F. 2d 873.

No. 88-6463. JACKSON *v.* LONG BEACH POLICE DEPARTMENT. C. A. 9th Cir. Certiorari denied.

No. 88-6464. FIXEL *v.* WHITLEY, WARDEN. Sup. Ct. Nev. Certiorari denied. Reported below: 104 Nev. 857.

No. 88-6469. RODMAN *v.* MISNER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 852 F. 2d 569.

No. 88-6472. MURPHY *v.* THEISSEN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1086.

No. 88-6483. WILCHES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 867 F. 2d 605.

No. 88-6486. DAHDAH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 864 F. 2d 55.

No. 88-6490. TRAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88-6502. VOSS *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 50.

No. 88-6507. SHEAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 825 F. 2d 783.

No. 88-6509. WALKER *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 852 F. 2d 379.

No. 88-6510. VIDAURE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 1337.

No. 88-6514. LATCHINIAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 793.

No. 88-6517. CABRERA *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 867 F. 2d 1423.

No. 88-6518. COUZENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 792.

No. 88-6521. BELL *v.* DUCKWORTH, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 861 F. 2d 169.

No. 88-6522. CLARK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 88-6523. SINGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 866 F. 2d 1421.

No. 88-6526. LEIBOWITZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 857 F. 2d 373.

No. 88-6528. LAROQUE *v.* UNITED STATES ET AL.; and IN RE LAROQUE. C. A. D. C. Cir. Certiorari denied.

No. 88-6534. RYAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 253.

No. 88-6545. JOINER *v.* SOLEM, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 88-6551. ORTEGA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 253.

No. 88-6556. COX *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 88-6558. RITTENOUR *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 76 Md. App. 797.

No. 88–6559. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 863 F. 2d 884.

No. 88–6561. CHEESEBOROUGH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 792.

No. 88–6565. EMBREY *v.* UNITED STATES (three cases). C. A. 8th Cir. Certiorari denied.

No. 88–6566. HILL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 864 F. 2d 601.

No. 88–6569. HALL *v.* SOWDERS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 856 F. 2d 194.

No. 88–6576. VILLARREAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 863 F. 2d 881.

No. 88–6583. POWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 265.

No. 88–6587. RANTZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 862 F. 2d 808.

No. 88–6608. KUNEK *v.* COFFMAN ET AL. C. A. 2d Cir. Certiorari denied.

No. 88–6609. SAA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 859 F. 2d 1067.

No. 88–6616. AYUB *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 863 F. 2d 886.

No. 88–6625. HEUBEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 2d 1410.

No. 88–6633. COTTEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 265.

No. 88–6640. WEIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 861 F. 2d 542.

No. 88–6645. LIOUMIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 1271.

No. 88–902. BERSANI ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.; and

No. 88–929. ROBICHAUD ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 2d Cir. Motions of

National Association of Home Builders et al., American Planning Association, Chamber of Commerce of the United States, and Louisiana Landowners Association, Inc., for leave to file briefs as *amici curiae* in No. 88–902 granted. Motions of Pacific Legal Foundation et al. and American Association of Port Authorities for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 850 F. 2d 36.

No. 88–1003. COLONIAL SAVINGS ASSN. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 854 F. 2d 1001.

No. 88–1099. BV ENGINEERING *v.* UNIVERSITY OF CALIFORNIA, LOS ANGELES. C. A. 9th Cir. Motions of Columbia Pictures Industries, Inc., et al., Association of American Publishers, Inc., et al., Center for the Protection of Creative Rights, and American Intellectual Property Law Association for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 858 F. 2d 1394.

No. 88–1165. COUNTY OF SONOMA *v.* HERRINGTON ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 834 F. 2d 1488 and 857 F. 2d 567.

No. 88–1204. AVINS ET AL. *v.* VIRGINIA COUNCIL OF HIGHER EDUCATION ET AL. Sup. Ct. Va. Motion of Coalition for Religious Freedom for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 52 Ohio App. 3d 112, 557 N. E. 2d 139.

No. 88–1229. OHIO *v.* BOWE ET AL. Ct. App. Ohio, Summit County. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 88–1266. IDAHO STATE TAX COMMISSION ET AL. *v.* BLANGERS ET AL. Sup. Ct. Idaho. Certiorari denied. JUSTICE BLACKMUN and JUSTICE O'CONNOR would grant certiorari. Reported below: 114 Idaho 944, 763 P. 2d 1052.

No. 88–1275. CRIST, RECEIVER FOR TRANSIT CASUALTY CO. *v.* WAL-MART STORES, INC., ET AL. C. A. 8th Cir. Motion of Texas Property & Casualty Insurance Guaranty Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and this petition. Reported below: 855 F. 2d 1326.

No. 88–5961. COPELAND *v.* LOUISIANA. Sup. Ct. La.;
No. 88–6148. EARVIN *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir.;
No. 88–6150. BARBER *v.* TEXAS. Ct. Crim. App. Tex.;
No. 88–6203. MATTHEWS *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 88–6350. JENNINGS *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–6361. JOHNSON *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 88–6365. BELL *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 88–6393. WOOMER *v.* AIKEN, WARDEN, ET AL. C. A. 4th Cir.;
No. 88–6424. MOORE *v.* ZANT, WARDEN. C. A. 11th Cir.;
No. 88–6530. HOLLAND *v.* TEXAS. Ct. Crim. App. Tex.; and
No. 88–6655. STEVENS *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: No. 88–5961, 530 So. 2d 526; No. 88–6148, 860 F. 2d 623; No. 88–6150, 757 S. W. 2d 359; No. 88–6203, 296 S. C. 379, 373 S. E. 2d 587; No. 88–6350, 46 Cal. 3d 963, 760 P. 2d 475; No. 88–6361, 762 S. W. 2d 110; No. 88–6365, 745 S. W. 2d 858 and 759 S. W. 2d 651; No. 88–6393, 856 F. 2d 677; No. 88–6530, 761 S. W. 2d 307; No. 88–6655, 104 Nev. 867.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–6012. TRAN *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 849 F. 2d 1064.

No. 88–6341. BONIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 46 Cal. 3d 659, 758 P. 2d 1217.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even

if I did not hold this view, I would grant the petition to resolve the question whether a trial court may instruct a penalty phase jury that, "[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall* impose a sentence of death." As I stated in *Hamilton* v. *California*, 488 U. S. 1047 (1989) (MARSHALL, J., dissenting from denial of certiorari), "I have grave doubts that such an instruction permits the individualized and reliable sentencing determination that the Constitution requires in capital cases, particularly where, as here, it is coupled with prosecutorial remarks stressing the limits on jurors' discretion." *Ibid.* I dissent.

Rehearing Denied

No. 87–1224. ORING *v.* STATE BAR OF CALIFORNIA, 488 U. S. 590;

No. 88–893. WALKER ET AL. *v.* VALLEY NATIONAL BANK OF DES MOINES, IOWA, ADMINISTRATOR OF THE ESTATE OF WALKER, ET AL., 488 U. S. 1035;

No. 88–5864. HOOKS *v.* ALABAMA, 488 U. S. 1050;

No. 88–5936. DAVIS *v.* CITY OF TUCSON, 488 U. S. 1032; and

No. 88–6137. SWENSON *v.* MARSH, SECRETARY OF THE ARMY, *ante*, p. 1025. Petitions for rehearing denied.

No. 88–658. PANHANDLE EASTERN PIPE LINE CO. *v.* ILLINOIS EX REL. HARTIGAN, ATTORNEY GENERAL OF ILLINOIS, 488 U. S. 986. Motion for leave to file petition for rehearing denied.

No. 88–5732. HILL *v.* REDMAN, WARDEN, 488 U. S. 996. Motion for leave to file petition for rehearing denied. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

MARCH 21, 1989

Certiorari Denied

No. 88–6857 (A–746). KING *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Ct. Crim. App. Tex.; and

No. A–758 (88–6861). KING *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Applications for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari de-

nied in No. 88–6857. JUSTICE BLACKMUN and JUSTICE STEVENS would grant the application for stay in No. A–758.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would grant the stay of execution.

Even if I were not of the foregoing view, I would grant Leon King's applications for a stay pending our decision in *Penry* v. *Lynaugh*, 832 F. 2d 915 (CA5 1987), cert. granted, 487 U. S. 1233 (1988). King's claim to a stay is at least as meritorious as that presented by at least four other petitioners whose executions we have stayed. See *Williams* v. *Lynaugh*, 837 F. 2d 1294 (CA5), stay granted, 484 U. S. 1051 (1988); *Selvage* v. *Lynaugh*, 842 F. 2d 89 (CA5), stay granted, 485 U. S. 983 (1988); *Bridge* v. *Lynaugh*, 856 F. 2d 712 (CA5), stay granted, 487 U. S. 1260 (1988); *Bell* v. *Lynaugh*, 858 F. 2d 978 (CA5), stay granted, 488 U. S. 905 (1988). In none of those cases did we deny a stay on the ground that the petitioner was procedurally barred from challenging the State's capital sentencing scheme, despite the apparent failure of each of those petitioners to object at sentencing to the statutory requirement that the jury limit its consideration of mitigating evidence to its determination whether or not the defendant acted deliberately and whether he would pose a danger to society in the future. It seems to me unconscionable to deny King's application for a stay after having granted stays in *Williams*, *Selvage*, *Bridge*, and *Bell*.

No. 88–6863 (A–759). KING *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Certiorari denied. Reported below: 850 F. 2d 1055.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153,

227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

MARCH 22, 1989

Dismissal Under Rule 53

No. 88-5772. WASHINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 850 F. 2d 1038.

MARCH 23, 1989

Dismissal Under Rule 53

No. 88-287. TIMES MIRROR CO. ET AL. *v.* DOE. Ct. App. Cal., 4th App. Dist. Certiorari dismissed under this Court's Rule 53. Reported below: 198 Cal. App. 3d 1420, 244 Cal. Rptr. 556.

MARCH 27, 1989

Appeal Dismissed

No. 88-1011. HARMAN ET AL. *v.* DOLE, SECRETARY OF LABOR, ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 860 F. 2d 1075.

Certiorari Dismissed

No. 88-6635. WILLIAMS *v.* KEMP, WARDEN. C. A. 11th Cir. Motion of petitioner to defer consideration of the petition for writ of certiorari denied. Certiorari dismissed for want of jurisdiction. Reported below: 846 F. 2d 1276.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Miscellaneous Orders

No. ——. MCCONICO *v.* CONRADI. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. D–746. IN RE DISBARMENT OF LINDQUIST. Disbarment entered. [For earlier order herein, see 488 U. S. 963.]

No. D–748. IN RE DISBARMENT OF JURON. Disbarment entered. [For earlier order herein, see 488 U. S. 1000.]

No. D–753. IN RE DISBARMENT OF REAVES. Disbarment entered. [For earlier order herein, see 488 U. S. 1026.]

No. D–754. IN RE DISBARMENT OF HARTMAN. Disbarment entered. [For earlier order herein, see 488 U. S. 1026.]

No. D–756. IN RE DISBARMENT OF MCCLURKIN. Disbarment entered. [For earlier order herein, see 488 U. S. 1026.]

No. D–758. IN RE DISBARMENT OF SILVERMAN. Disbarment entered. [For earlier order herein, see 488 U. S. 1027.]

No. D–759. IN RE DISBARMENT OF HARTMANN. Disbarment entered. [For earlier order herein, see 488 U. S. 1027.]

No. D–764. IN RE DISBARMENT OF SMITH. Disbarment entered. [For earlier order herein, see 488 U. S. 1039.]

No. 88–6494. WRENN *v.* BENSON ET AL. C. A. 6th Cir.;

No. 88–6497. WRENN *v.* DEPARTMENT OF MENTAL HEALTH OF OHIO. C. A. 6th Cir.; and

No. 88–6533. FERMIN *v.* COMMODITY FUTURES TRADING COMMISSION ET AL. C. A. D. C. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 17, 1989, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for writs of certiorari without reaching the merits of the motions to proceed *in forma pauperis*.

No. 88–6537. IN RE HOLMES. Petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 88–926. NORTH DAKOTA ET AL. *v.* UNITED STATES. Appeal from C. A. 8th Cir. Probable jurisdiction noted. Reported below: 856 F. 2d 1107.

Certiorari Granted

No. 88–6222. BLYSTONE *v.* PENNSYLVANIA. Sup. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question II presented by the petition. Reported below: 519 Pa. 450, 549 A. 2d 81.

Certiorari Denied. (See also No. 88–1011, *supra.*)

No. 88–1038. BERBERIAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 851 F. 2d 236.

No. 88–1109. CBC, INC. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM. C. A. 10th Cir. Certiorari denied. Reported below: 855 F. 2d 688.

No. 88–1155. CROWN LIFE INSURANCE CO. *v.* GRIMES, INSURANCE COMMISSIONER OF OKLAHOMA AND RECEIVER FOR UNITED EQUITY LIFE INSURANCE CO., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 857 F. 2d 699.

No. 88–1272. H. K. PORTER CO., INC. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 855 F. 2d 1499.

No. 88–1273. ARONOV *v.* SECRETARY OF REVENUE, NORTH CAROLINA DEPARTMENT OF REVENUE. Sup. Ct. N. C. Certiorari denied. Reported below: 323 N. C. 132, 371 S. E. 2d 468.

No. 88–1274. LARSEN *v.* PHILADELPHIA NEWSPAPERS, INC., ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 375 Pa. Super. 66, 543 A. 2d 1181.

No. 88–1280. PENNSYLVANIA INDEPENDENT PETROLEUM PRODUCERS *v.* PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 520 Pa. 59, 550 A. 2d 195.

No. 88–1286. CARTER ET AL. *v.* BROADLAWNS MEDICAL CENTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 857 F. 2d 448.

No. 88–1288. PETTY *v.* OHIO. Ct. App. Ohio, Richland County. Certiorari denied.

No. 88–1289. HOWE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 379 Pa. Super. 659, 545 A. 2d 384.

No. 88–1291. GREGORY ET AL. *v.* POPEYES FAMOUS FRIED CHICKEN & BISCUITS, INC. C. A. 6th Cir. Certiorari denied. Reported below: 857 F. 2d 1474.

No. 88–1292. BEEDING *v.* MILLER. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 167 Ill. App. 3d 128, 520 N. E. 2d 1058.

No. 88–1297. GLICK ET AL. *v.* GEORGES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 856 F. 2d 971.

No. 88–1303. BROWN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 533 So. 2d 1118.

No. 88–1306. KRIVANEK *v.* MAD RIVER VALLEY HEALTH CENTER, INC. C. A. 2d Cir. Certiorari denied. Reported below: 863 F. 2d 45.

No. 88–1343. DARLINGTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 849 F. 2d 76.

No. 88–1373. AMERICAN BICYCLE CO., INC., ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 88–1391. AVIS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 209 Conn. 290, 551 A. 2d 26.

No. 88–1408. LOVETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 854 F. 2d 1280.

No. 88–5994. VAMOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 838 F. 2d 1204.

No. 88–6053. MOSES *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 88–6098. THOMAS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 168 Ill. App. 3d 113, 522 N. E. 2d 253.

No. 88–6161. CANTU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 853 F. 2d 288.

No. 88–6363. EVANS *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 857 F. 2d 790.

No. 88–6375. TAFOYA *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 108 N. M. 1, 765 P. 2d 1183.

No. 88–6388. CURRY *v.* BARRETT ET AL. C. A. 5th Cir. Certiorari denied.

No. 88–6466. BROWN *v.* MISSOURI ET AL. C. A. 8th Cir. Certiorari denied.

No. 88–6467. SIVAK *v.* MURPHY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 265.

No. 88–6474. VALDEZ *v.* MYERS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 88–6475. THOMPSON *v.* VELASQUEZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 861 F. 2d 717.

No. 88–6476. HOCH *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 234 Mont. 405, 763 P. 2d 1119.

No. 88–6479. CARR *v.* LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 530 So. 2d 579.

No. 88–6485. BOLAND *v.* RAFFERTY, SUPERINTENDENT, NEW JERSEY STATE PRISON AT RAHWAY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 865 F. 2d 249.

No. 88–6491. GARNER *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 13 Kan. App. 2d xxvi, 763 P. 2d 322.

No. 88–6500. MESSINGER *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 88–6503. MINTON *v.* SHEET METAL WORKERS LOCAL UNION NO. 54, AFL–CIO, ET AL. C. A. 5th Cir. Certiorari denied.

No. 88–6504. STEWARD *v.* DEPARTMENT OF THE NAVY. C. A. 4th Cir. Certiorari denied. Reported below: 852 F. 2d 566.

No. 88–6506. COX *v.* SHERIFF OF PINE COUNTY, MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 88–6508. FELLS *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 866 F. 2d 1409.

No. 88–6529. JOHNSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 40 Ohio St. 3d 130, 532 N. E. 2d 1295.

No. 88-6535. LEIBOWITZ *v.* MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 867 F. 2d 605.

No. 88-6536. TEMPEL *v.* ALASKA ET AL. C. A. 9th Cir. Certiorari denied.

No. 88-6544. ROBBINS *v.* COOK, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 88-6552. CUNNINGHAM *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 852 F. 2d 1292.

No. 88-6554. ROBBINS ET UX. *v.* CITY OF AUBURN, MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 550 A. 2d 362.

No. 88-6555. CHURCH *v.* WARREN, JUDGE, CIRCUIT COURT OF VIRGINIA, AMELIA COUNTY. Sup. Ct. Va. Certiorari denied.

No. 88-6646. BECTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 860 F. 2d 1087.

No. 88-6647. GROWNEY *v.* GROWNEY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 844 F. 2d 789.

No. 88-6676. BURNS *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 859 F. 2d 925.

No. 88-6694. TOWNSEND *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 261.

No. 88-6699. MARTINEZ-JIMENEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 864 F. 2d 664.

No. 88-6704. SIMMONS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 865 F. 2d 1261.

No. 88-6709. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 865 F. 2d 262.

No. 88-6861. KING *v.* LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 868 F. 2d 1400.

No. 88-989. FLORIDA *v.* CAPLAN. Sup. Ct. Fla. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 531 So. 2d 88.

No. 88–1153. W. W. RODGERS & SONS PRODUCE, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari limited to Question 1 presented by the petition. Reported below: 857 F. 2d 790.

No. 88–1283. WELLS, WARDEN *v.* LENT. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 861 F. 2d 972.

No. 88–1299. GEBBIE, ASSISTANT DIRECTOR, OREGON DEPARTMENT OF HUMAN RESOURCES *v.* BRADY. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari limited to Questions 1 and 2 presented by the petition. Reported below: 859 F. 2d 1543.

No. 88–6273. RICHARDSON *v.* ILLINOIS. Sup. Ct. Ill.;
No. 88–6489. COLEMAN *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88–6493. STARR *v.* ARKANSAS. Sup. Ct. Ark.;
No. 88–6501. SWAFFORD *v.* FLORIDA. Sup. Ct. Fla.; and
No. 88–6652. VAN HOOK *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: No. 88–6273, 123 Ill. 2d 322, 528 N. E. 2d 612; No. 88–6489, 46 Cal. 3d 749, 759 P. 2d 1260; No. 88–6493, 297 Ark. 26, 759 S. W. 2d 535; No. 88–6501, 533 So. 2d 270; No. 88–6652, 39 Ohio St. 3d 256, 530 N. E. 2d 883.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 88–6095. CORTEZ *v.* PRICE ET AL., *ante*, p. 1024;
No. 88–6145. MARTIN *v.* SHANK ET AL., *ante*, p. 1025;
No. 88–6146. DIAMOND *v.* DISCIPLINARY COUNSEL ET AL., *ante*, p. 1025; and
No. 88–6210. BOX *v.* PETSOCK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AND DIAGNOSTIC (AND CLASSIFICATION CENTER) AT PITTSBURGH, ET AL., *ante*, p. 1028. Petitions for rehearing denied.

No. 88–6044. ROGERS *v.* ILLINOIS, 488 U. S. 1046. Motion for leave to file petition for rehearing denied.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1100 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

BROTHERHOOD OF RAILROAD SIGNALMEN ET AL. *v.* SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY

ON APPLICATION TO VACATE INJUNCTION

No. A–715. Decided March 14, 1989.

Application to vacate the injunction issued by the District Court is denied.

JUSTICE BRENNAN, Circuit Justice.

Applicants request me, as Circuit Justice, to enter an order "immediately dissolving" the injunction issued by the District Court for the Eastern District of Pennsylvania. I deny the application. In my view, applicants have not "established that there is a 'reasonable probability' that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Rostker* v. *Goldberg*, 448 U. S. 1306, 1308 (1980) (BRENNAN, J., in chambers).

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